

1 UNITED STATES DISTRICT COURT
2 EASTERN DISTRICT OF WISCONSIN
3 MILWAUKEE DIVISION

4 TRACY L. WINK,

5 Plaintiff,

6 vs.

Case No. 14-C-367

7 MILLER COMPRESSING COMPANY,

8 Defendant.

9 -----

10

11

Deposition of SARAH K. BARBIAN

12

Monday, January 26th, 2015

13

9:03 a.m.

14

at

15

ALAN C. OLSON & ASSOCIATES, S.C.

16

2880 South Moorland Road

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New Berlin, Wisconsin

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Reported by Elaine A. Thies, RPR

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1 Deposition of SARAH K. BARBIAN, a
 2 witness in the above-entitled action, taken at the
 3 instance of the Plaintiff, pursuant to Chapter 804 of
 4 the Wisconsin Statutes, pursuant to notice, before
 5 Elaine A. Thies, RPR and Notary Public, State of
 6 Wisconsin, at ALAN C. OLSON & ASSOCIATES, S.C., 2880
 7 South Moorland Road, New Berlin, Wisconsin, on the
 8 26th day of January, 2015, commencing at 9:03 a.m.
 9 and concluding at 2:29 p.m.

10

11 A P P E A R A N C E S:

12 ALAN C. OLSON & ASSOCIATES, S.C., by
 13 Mr. Alan C. Olson and Ms. Brianna M. Covington
 14 2880 South Moorland Road
 New Berlin, Wisconsin 53151
 Appeared on behalf of the Plaintiff.

15 THOMPSON COBURN LLP, by
 16 Ms. Susan M. Lorenc
 17 55 East Monroe Street, 37th Floor
 Chicago, Illinois 60603
 Appeared on behalf of the Defendant.

18

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1 TRANSCRIPT OF PROCEEDINGS

2 SARAH K. BARBIAN, called as a witness

3 herein, having been first duly sworn on oath, was

4 examined and testified as follows:

5 EXAMINATION

6 BY MR. OLSON:

7 Q Could you state and spell your name for the record.

8 A Sarah Barbian, S-A-R-A-H B-A-R-B-I-A-N.

9 Q Ms. Barbian, during this deposition I will be
10 asking you questions. You're under oath. You have
11 to provide truthful responses to my questions. If
12 you do not hear a question, I will restate it for
13 you. If you don't understand a question I can
14 rephrase it. If you answer my question, I will
15 assume that you heard it and you understood it and
16 you are answering it accurately.

17 It's important that Elaine get
18 everything down accurately today, so we have to try
19 not to talk over one another. If you need to take
20 a break at some point, as long as there's no
21 question pending we can take a break.

22 Do you have any questions about the
23 process?

24 A No.

25 Q Have you ever given a deposition before?

6

1 A Yes.

2 Q Okay. And how many times?

3 A Twice.

4 Q Okay. And in what matter was that or matters?

5 A One was an N.L.R.B. charge.

6 Q Okay.

7 A And the other was a non-compete case.

8 Q Okay. And the N.L.R.B. was when?

9 A 2011 or 2012.

10 Q Okay. At Miller Compressing?

11 A Yes.

12 Q Okay. And what was the result of that action?

13 A No findings.

14 Q Okay. And the non-compete, was that also at Miller
15 Compressing?

16 A Yes, it was.

17 Q Okay. And when was that?

18 A 2006.

19 Q The N.L.R.B. claim was brought by whom?

20 A The union, the United Steelworkers, on behalf of
21 Luther Borders, the union business agent.

22 Q Okay. So that matter is done?

23 A Yes.

24 Q There's nothing pending? There's no appeal or

25 anything else with that --

7

1 A Correct.

2 Q -- case?

3 And the non-compete, what was the
4 result of that case?

5 A Miller Compressing won the non-compete case against
6 the company who hired former employees of ours to
7 directly compete against the company.

8 Q All right. And have you been involved in any
9 lawsuits other than those two?

10 A No.

11 Q Have you ever been arrested?

12 A No.

13 Q Have you ever tested positive for drugs or alcohol?

14 MS. LORENC: Objection. You can answer.

15 THE WITNESS: No.

16 BY MR. OLSON:

17 Q Have you ever filed for bankruptcy?

18 A No.

19 Q Have you ever been audited by the IRS?

20 A No.

21 Q Do you know of any reason why you would not be able
22 to give accurate testimony today?

23 A No.

24 Q What did you do to prepare for your deposition
25 today?

8

1 A I reviewed the interrogatories and responses.

2 Q Okay. Did you review any other documents?

3 A I reviewed my notes from Tracy's deposition.

4 Q Okay. And when did you last review those?

5 A This morning.

6 Q Okay. And those notes helped refresh your
7 recollection as to the facts as she stated them?

8 A Correct.

9 Q Okay. I'd like to see those notes, please.

10 MS. LORENC: We're going to object on a
11 work product privilege basis.

12 MR. OLSON: That's it, work product?

13 MS. LORENC: And attorney-client
14 privilege. They may -- I have not reviewed them
15 but they may very well reflect conversations
16 between the two of us.

17 MR. OLSON: Okay.

18 BY MR. OLSON:

19 Q And do you have those notes in your possession?

20 A Yes.

21 Q Okay. I'd like you to show me not the subject of

22 the notes at this point but the -- what the notes
23 look like so we can make a record of that.
24 MS. LORENC: And I'll allow her to show
25 them sort of generally but not for your review.

9

1 MR. OLSON: Right.
2 BY MR. OLSON:
3 Q Okay. So tell me if I'm describing this
4 accurately. You've got a manila folder with
5 approximately 50 pages of documents and notes. And
6 take a look at your notes. Is there anything in
7 there where you are -- you have a note to your
8 lawyer or your lawyer has a note to you?
9 A Repeatedly.
10 Q Okay. Those are notes that you shared with your
11 attorney during the deposition, is that it?
12 A They're notes that I made so that she and I could
13 discuss them on breaks during the deposition.
14 Q Okay. And so those don't reflect the actual
15 conversations you had with your attorney. They're
16 only notes to remind you of things that were said
17 by Ms. Wink during her deposition; true?
18 MS. LORENC: Objection, misstates her
19 testimony.
20 MR. OLSON: You can object to form
21 without giving a substantive statement.

22 BY MR. OLSON:

23 Q Is that accurate?

24 A They are notes of things that I wanted to discuss
25 with Susan on break.

10

1 Q Okay.

2 MR. OLSON: And you're refusing to
3 produce those notes today unless I bring a motion
4 with the Court; is that accurate?

5 MS. LORENC: The former is accurate. The
6 latter might be necessary. I need to review the
7 notes in greater detail.

8 MR. OLSON: All right. What I'd suggest
9 is during a break if you'd like to look at those go
10 ahead, and I will make an effort to get the Court
11 on the phone. You can decide how important it is
12 for you to stand by that objection. If you want to
13 do that, that's fine, and I'll make an effort then
14 to communicate with the Court.

15 MS. LORENC: That's fine.

16 BY MR. OLSON:

17 Q What is your home address?

18 A 8060 South Bernards Way, Oak Creek, Wisconsin.

19 Q Who resides there with you?

20 A My husband.

21 Q His name?
22 A Shawn Barbian.
23 Q Where does he work?
24 A Kenall Manufacturing.
25 Q And is that your first and only marriage?

11

1 A Yes.
2 Q What is your educational background?
3 A I have my -- I have a double major and a minor from
4 undergrad, and I have coursework towards my masters
5 degree, and I have a professional and human resources
6 certification.
7 Q And from what institution did you earn your
8 undergrad?
9 A University of Wisconsin, Whitewater.
10 Q What year?
11 A 2000.
12 Q You mentioned you have a double major. What was
13 that?
14 A Management computer systems and human resources.
15 Q All right. And your masters, you're working on
16 that where?
17 A Marquette.
18 Q Okay. And when was the last time you took a course
19 toward your masters degree?
20 A 2008.

21 Q How many credits are you away from that?
22 A I don't know. I haven't -- I haven't continued
23 taking it. I think you misunderstood me. I said I
24 took coursework toward my masters.
25 Q I see. So you don't have any intent to continue

12

1 that?
2 A Correct.
3 Q I see. And where did you earn your HR professional
4 certificate from? I'm paraphrasing what you told
5 me.
6 A They're all earned from the same certification. It's
7 a national certification. It's the Human Resources
8 Certification Institute.
9 Q Okay. And through that training what have you
10 received on the topic of FMLA?
11 A Could you be more specific?
12 Q Sure. Were you trained on the FMLA with respect to
13 your certification?
14 A Yes.
15 Q Okay. And when last were you trained on FMLA?
16 A The certification was in 2007, 2008.
17 Q Okay. And did you receive written materials
18 through that study?
19 A Yes.

20 Q And did you maintain those materials?
21 A No.
22 Q Have you received any training on the FMLA since
23 2007, 2008?
24 A No.
25 Q And by training I mean even informally through a

13

1 law firm, through a seminar, through written
2 materials provided by an HR entity or organization
3 or group.

4 MS. LORENC: I'm going to object to the
5 extent that calls for attorney-client privileged
6 information, but you can answer otherwise.

7 MR. OLSON: Well, she can identify
8 whether she's received training if I don't ask her
9 the substance at least at this point. This is a
10 central issue in the case so I'm entitled to
11 establish this individual's background.

12 BY MR. OLSON:

13 Q Again, what training have you received if it was
14 from a law firm on FMLA?

15 MS. LORENC: And I'll object to the term
16 training, but you can answer if you understand it.

17 THE WITNESS: I haven't received any
18 informal training from a law firm, but I have had
19 specific discussions with several attorneys

20 regarding Family Medical Leave.

21 BY MR. OLSON:

22 Q Okay. And did you have any of those discussions
23 with respect to Ms. Wink?

24 A Yes, I did.

25 Q Okay. And when in relation to her termination did

14

1 you have those discussions: Before, after, during,
2 or all?

3 A All.

4 Q Okay. And did you have discussions with legal
5 counsel about Ms. Wink's termination before the
6 termination?

7 A Ms. Wink wasn't terminated. She voluntarily
8 resigned.

9 Q She resigned when you could not accommodate her
10 hours; is that correct?

11 MS. LORENC: Objection to form. You can
12 answer.

13 THE WITNESS: She resigned when the
14 company informed her that we were no longer able to
15 continue the exception to her differing work hours
16 from the rest of the department and when we
17 informed her that her work performance needed to
18 improve, that there would no longer be employees

19 from other departments who would be able to assist
20 in covering her workload.
21 BY MR. OLSON:
22 Q Did you ever warn her about her performance?
23 A Yes, we did.
24 Q Okay. Does the company have a progressive
25 discipline policy?

15

1 MS. LORENC: Objection to form. When are
2 you discussing?
3 MR. OLSON: Any time.
4 BY MR. OLSON:
5 Q Does the company have a progressive discipline
6 policy?
7 A The company has a series of policies. There's a
8 plant rule policy which follows progressive
9 disciplinary action.
10 Q Okay. During --
11 A Performance issues sometimes do and sometimes don't
12 follow progressive discipline.
13 Q During Ms. Wink's employment was she covered by a
14 progressive discipline policy?
15 A She was covered by the policy that I just explained.
16 Q Okay. And is that policy in writing?
17 A The plant rules are in writing.
18 Q Okay. And the plant rules cover her --

19 A Correct.

20 Q -- covered her?

21 A Correct.

22 Q And were those plant rules contained in the

23 handbook or were they separate?

24 A The company doesn't have a handbook.

25 Q Okay. The plant rules are in writing; correct?

16

1 A Yes.

2 Q And have those rules been produced as part of this

3 lawsuit?

4 MS. LORENC: If you know.

5 THE WITNESS: I don't -- I don't recall

6 specifically if they have or have not.

7 BY MR. OLSON:

8 Q Okay. Did you participate in the document

9 production in this case?

10 A Yes, I did.

11 Q Okay. So any documents asked for you were

12 personally involved in searching for the records

13 responsive to the request; is that accurate?

14 A Yes.

15 Q Okay. And what is the progressive discipline

16 policy?

17 A Could you be more specific as --

18 Q What is it --
19 A -- for what?
20 Q Well, did you draft it?
21 A No.
22 Q Were you responsible for enforcing it?
23 A Yes.
24 Q And had you enforced it a number of times?
25 MS. LORENC: Objection to form.

17

1 THE WITNESS: I need you to be more
2 specific about which policy was being enforced.
3 BY MR. OLSON:
4 Q The progressive discipline policy that we've been
5 talking about.
6 A With respect to which rule? There were numerous
7 policies including plant rules.
8 Q Okay. Let's go with at the time of Ms. Wink's
9 termination of employment, what was the progressive
10 discipline policy?
11 MS. LORENC: Objection, misstates her
12 testimony.
13 MR. OLSON: So you're objecting to form?
14 MS. LORENC: I am objecting to the form
15 of your question.
16 BY MR. OLSON:
17 Q Excuse me a moment. At the time of the end of

18 Ms. Wink's end of employment, what was the
19 progressive discipline policy that applied to her?
20 A She would have been subject to the company's plant
21 rules. She would have been subject to the company's
22 cell phone policy, harassment policy.
23 Q Okay, and what I'm focusing on when an employee
24 violates a rule, what is the progressive discipline
25 policy that would apply to that employee?

18

1 A There are a series of different types of rules.
2 Q Okay. What are they?
3 A There's A, B and C, and then the handbook also states
4 that other violations not covered or the situation is
5 subject to action not to follow the policy.
6 Q Okay. So if there's a serious infraction, the
7 company has the discretion to skip all the rules?
8 A Correct.
9 Q Okay. Now, you had just used the term the company
10 handbook, but I thought you testified earlier there
11 was no handbook, so I want to make sure we're on
12 the same page there.
13 A I didn't use the term handbook.
14 MR. OLSON: Could you read back her
15 answer and indicate whether she said handbook.
16 (Requested portion read by the reporter.)

17 THE WITNESS: Okay. So I misstated. It
18 should be the rulebook. It's not a handbook.

19 BY MR. OLSON:

20 Q And the rulebook is -- Do you know what the title
21 is on that document?

22 A Plant rules.

23 Q Okay. And what would be the process you would take
24 to get a copy of that? Is that something you keep
25 in your office that's readily accessible to you?

19

1 A That who would take to get a copy of it?

2 Q You.

3 A I have a copy in my office.

4 Q Okay. You don't have a copy with you, I assume?

5 A No.

6 Q Okay. And do you have a copy of the one that was
7 in place at the time of Ms. Wink's separation from
8 employment?

9 A The plant rules that were in place at that time have
10 been in place since 1978.

11 Q And they still haven't changed?

12 A No.

13 Q Okay. So you said there's A, B and C. What is A?

14 A A rules are the rules that are subject to a verbal
15 warning, a written warning, a suspension, and then a
16 termination.

17 Q Okay. And are there certain types of infractions
18 that are included in that category?
19 A Yes.
20 Q Okay. And what types of infractions are those?
21 A Wasting time, inefficiency, taking extended breaks or
22 lunches, violation of published safety rules like PPE
23 violations, and a number of others.
24 Q And B, is that a group of more serious infractions?
25 A Yes.

20

1 Q Okay. And how does A differ from B with respect to
2 the type of discipline that would be doled out
3 under that policy?
4 A A B rule violation would be grounds for suspension
5 and the first step in termination and the second
6 step.
7 Q Okay. And a C rule is something like stealing or a
8 crime?
9 A A C rule would be grounds for termination on the
10 first offense.
11 Q Okay. And what things are in that category?
12 A Which?
13 Q A C.
14 A C?
15 Q Right.

16 A Sabotage, direct threats of safety or health,
17 stealing from the company, insubordination, walking
18 off the job.
19 Q Okay. And what are the infractions within the B
20 list?
21 A Sleeping on the job. I forget the exact wording but
22 basically endangering the safety or health of
23 yourself or someone else through negligence or
24 carelessness, and several others.
25 Q Okay. Now, you mentioned in the context of

21

1 Ms. Wink's separation of employment that there was
2 a problem with her performance, that she would not
3 be helped by other employees; is that correct?
4 A Not that she would not be helped by other employees
5 but that the help from other employees would not be
6 able to continue.
7 Q Okay. So there would be a termination of help from
8 other employees; is that correct?
9 A It wouldn't be a termination of that help. It's that
10 those other employees would not be available. The
11 company was going through numerous reductions and
12 layoffs.
13 Q Okay. And the reason for the help not being
14 available to her was what? There was a change and
15 you said it was something to do with her phone.

16 What was that?

17 A The reason --

18 MS. LORENC: Objection. That misstates
19 her testimony. You can answer.

20 MR. OLSON: So you're objecting to form?

21 MS. LORENC: Yes.

22 MR. OLSON: Okay.

23 THE WITNESS: The reason for the help not
24 being available to her is that there were numerous
25 reductions that were happening at the company, and

22

1 the help that she and her department were receiving
2 from other departments and from coworkers within
3 the department was no longer able to continue
4 because the staffing levels within those
5 departments and the overtime allowed within those
6 departments was being cut.

7 BY MR. OLSON:

8 Q Is it accurate to state that Ms. Wink's use of her
9 phone at work or using the phone at work had
10 nothing to do with her separation of employment?

11 A I would say, no, that's not accurate.

12 Q Okay. Then explain to us in every way how her use
13 of the phone related to her separation of
14 employment.

15 A She was asked and informed that she could no longer
16 continue to have an exception to the company's cell
17 phone policy to keep her personal cell phone on and
18 to make personal phone calls during working hours.
19 She was told that she can continue making personal
20 calls during breaks and lunchtimes but not during the
21 workday because it was disruptive to her and to other
22 people.
23 Q When was she first informed that she could no
24 longer use her personal cell phone in the manner
25 you just described?

23

1 A Friday, July 13th.
2 Q When was the last time she was told she could not
3 use her cell phone in the manner you just
4 described?
5 A Friday, July 13th, 2012.
6 Q And that was an oral statement to her?
7 A Yes.
8 Q It was not a written statement to her?
9 A Correct.
10 Q And she had not been warned about that previously?
11 A Correct. This was a change from a previous exception
12 that had been made.
13 Q Was this a form of discipline to her?
14 A Absolutely not.

15 Q Okay. So again, how did her -- how did the
16 restriction against her phone usage have something
17 to do with her separation of employment?
18 A It was one of several items that the company had
19 discussed with her would need to change going
20 forward, and she -- it was one of the items that she
21 stated she needed to have the exception continued to
22 be made.
23 Q Okay. And the reason she gave you for having the
24 exception necessary for her was for her to
25 communicate with her son's health care providers;

24

1 true?
2 A Correct.
3 Q And the health care her son was receiving was the
4 subject of her FMLA use; correct?
5 A It was --
6 MS. LORENC: Objection to form. You can
7 answer.
8 THE WITNESS: It was the subject of one
9 of her family medical leaves. She had several.
10 BY MR. OLSON:
11 Q I understand that's your argument, but right now
12 I'm focused on the time period of July 13, 2012;
13 okay?

14 A Uh-huh.

15 Q She only had one FMLA at that time; correct?

16 A Yes.

17 Q And that was for her son; correct?

18 A Correct.

19 Q All right. So again, back to my question. The

20 subject of her need for the phone as she stated it

21 was to communicate with her son's doctors; is that

22 accurate so far?

23 A Yes.

24 Q And is it also accurate to state that her

25 communication with her son's doctors related to his

25

1 care which was the subject of her FMLA usage at

2 that time?

3 A She had informed the company that she wanted an

4 exception to the policy so that she could schedule

5 appointments for her son.

6 Q All right. And those appointments for her son were

7 the reason that she needed FMLA; true?

8 A Correct.

9 Q And the company as of July 13 refused to provide

10 that accommodation for her; is that correct?

11 A No, that's not correct. The company told her that

12 she could continue doing so on breaks and during

13 lunchtime.

14 Q Okay. She told you she was on a waiting list for
15 her son; true?

16 MS. LORENC: Objection to form. You can
17 answer.

18 THE WITNESS: She told me she was on some
19 sort of waiting list.

20 BY MR. OLSON:

21 Q Right. And she said that she needed to be able to
22 receive a call from the health care provider on a
23 timely basis so that she could maintain her place
24 on the list; true?

25 A She had said that there was a time frame she needed

26

1 to respond within.

2 Q Right. And that if she waited until a break or
3 until after work, she might lose the spot for her
4 son on the waiting list; true?

5 A She didn't say how long -- I don't recall how long
6 she would lose the spot. I don't believe it was less
7 than two hours.

8 Q That was her concern though; right? She
9 communicated to you she was afraid that if she
10 waited her son would lose his spot on the waiting
11 list; true?

12 A That wasn't her initial reason for the request.

13 Q But it was her -- it was a stated concern to you
14 when you told her she couldn't use her cell phone
15 or receive calls on her cell phone unless it was
16 during a break; true?
17 A No, she didn't raise it at that point. She actually
18 when we discussed that stormed out of the meeting.
19 She didn't respond at all.
20 Q When did she tell you that?
21 A She had communicated that she was on a waiting
22 list --
23 Q Right.
24 A -- after the company had made the exception to allow
25 her to use a company phone or her phone to schedule

27

1 doctor and therapy appointments --
2 Q Okay.
3 A -- but she did not request the exception so that she
4 could keep her place in one of her waiting lists.
5 Q Okay. When did you learn that she was on a waiting
6 list?
7 A I don't recall specifically.
8 Q She told you that personally; true?
9 A She told myself and her direct supervisor that.
10 Q Right. And how many times did you discuss the
11 topic of FMLA with Ms. Wink?
12 MS. LORENC: Objection to form. You can

13 answer.

14 THE WITNESS: Not very often.

15 BY MR. OLSON:

16 Q I'd like you to estimate the number of times, and

17 we're going to go through each of those.

18 A With Ms. Wink specifically?

19 Q Right.

20 A Maybe two to three.

21 Q Okay. And when was the first time?

22 A The first time -- the first time was when it was

23 either she or her direct supervisor had communicated

24 to me that she was needing to miss work on an

25 intermittent basis for doctor and therapy

28

1 appointments for her son.

2 Q What year was that?

3 A I don't recall specifically.

4 Q Do you know if it was during when she initially

5 asked for it for her son or when there was a

6 recertification; do you remember the context of

7 that?

8 A It was when she initially asked for it.

9 Q So if I told you that happened in 2011, you don't

10 have any memory that would be inconsistent with

11 that necessarily?

12 A It would be somewhere between 2011 and 2012.

13 Q Okay. And do you remember her going through a

14 recertification of her FMLA request?

15 A Yes.

16 Q Okay. And what was your involvement in that if

17 anything?

18 A Little to none because I didn't handle directly the

19 leaves of absences. There was another person in my

20 office who handles that.

21 Q How did you become aware of the recertification?

22 A The person in my office who handles it just confirms

23 with me on a weekly basis as she's completing the

24 recertifications for any employee who's on a leave.

25 Q Okay. And that's done orally?

29

1 A Correct.

2 Q By Peggy Malmstadt?

3 A Correct.

4 MR. OLSON: And do you want a spelling on

5 that?

6 BY MR. OLSON:

7 Q M-A-L-M-S-T-A-D-T; is that correct?

8 A Correct.

9 Q Does she put that in a written report?

10 A No.

11 Q And so what did you do with that information that

12 Ms. Malmstadt provided to you concerning
13 recertification by Ms. Wink?

14 MS. LORENC: Objection to form. You can
15 answer.

16 THE WITNESS: Nothing. It was
17 informational only.

18 BY MR. OLSON:

19 Q We've covered the training that you've received.
20 Have you provided training to any of your employees
21 concerning the FMLA?

22 A No.

23 Q Has Ms. Malmstadt been trained as far as you know
24 on the FMLA?

25 A Yes.

30

1 Q From what source or sources if you know?

2 A From previous employers and she has attended
3 seminars. She has a PHR certification as well.

4 Q Did you hire her?

5 A Yes.

6 Q Is she still at Miller?

7 A Yes.

8 Q So you've covered now the communication you
9 received about Ms. Wink initially applying for FMLA
10 certification; true?

11 A Yes.

12 Q And you've also covered the -- that Malmstadt told
13 you about recertification when she orally reported
14 that to you on a weekly discussion?

15 A Correct.

16 Q And what were the other discussions you had with
17 anyone when legal counsel wasn't present about
18 Wink's FMLA?

19 MS. LORENC: And I'm going to object to
20 form. Are we still talking about the 2011-2012
21 time frame?

22 MR. OLSON: Any time, all the way through
23 separation of Wink's employment.

24 THE WITNESS: I had a conversation with
25 her direct supervisor Matthew Chavez and his

31

1 next-level manager Margo Eshleman and the president
2 of the company John Busby about her leave to ensure
3 that the department could cover the work when she
4 was gone.

5 BY MR. OLSON:

6 Q When was that conversation?

7 A It was sometime after the intermittent leave started
8 but prior to her resignation.

9 Q Can you narrow it down any further?

10 A I -- I don't know the specific date.

11 Q And did you have a series of meetings concerning a
12 reduction in force at the company?

13 A Yes.

14 Q And was that discussion part of that reduction in
15 force planning?

16 A That was the third conversation I had about her
17 leave.

18 Q Right, but did that fit within the larger category
19 of discussing the reduction in force at the
20 company?

21 MS. LORENC: Objection to form. You can
22 answer.

23 THE WITNESS: The conversation with them
24 about the reduction in force was -- only discussed
25 her leave on two issues: One, that the department

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1 could cover the work while she was gone given the
2 changing staffing and overtime availability within
3 the department and across the company as a whole;
4 and two, nondiscrimination training that I provided
5 to all managers, not just Margo and Matthew, in a
6 RIF selection.

7 BY MR. OLSON:

8 Q Okay. And what was the discussion about overtime
9 availability?

10 A It was that the Order Processing Team's department as
11 well as all departments that were nonunion employees
12 were being reduced to 40 hours or less of work per
13 week, and that the departments needed to cut each
14 person's overtime accordingly and know that if they
15 were getting assistance from other departments that
16 that assistance would stop.

17 Q And how did that relate to Ms. Wink if at all?

18 A The order processing department had previously been
19 cleared for essentially unlimited overtime, so there
20 were coworkers who were working additional hours to
21 help cover workload that Ms. Wink wasn't getting done
22 or wasn't getting done correctly. Her manager was
23 doing some additional work and reminding her of
24 things that should be done that she wasn't getting
25 completed. They were also getting assistance from

33

1 several other departments where different members of
2 the other departments would help with the workload in
3 the order processing department.

4 Q Ms. Wink was not working overtime hours; true?

5 A Not to my knowledge.

6 Q And she had not been working overtime hours since
7 she went on FMLA in 2011; is that accurate?

8 A No, that's not accurate. Ms. Wink normally preferred
9 not to work overtime before and after her Family

10 Medical Leave.

11 Q All right. So her over -- her not working
12 overtime, how many hours of overtime did other
13 people have to work as a result of that if you
14 know?

15 A As a result of what?

16 Q Her not working overtime.

17 A I don't know specifically.

18 Q Were you aware of anyone working overtime as a
19 result of Ms. Wink not working overtime?

20 A Yes.

21 Q Who were they?

22 A Matt Chavez who was a supervisor worked additional
23 hours to cover her work, and I know that there were a
24 couple of others within the department who would work
25 on things that she had not completed or wasn't able

34

1 to complete.

2 Q Matt Chavez was an exempt employee, was he not?

3 A He was exempt but he was working additional hours to
4 cover the work that she wasn't getting completed.

5 Q He wasn't paid any additional money for any hours
6 over 40 hours a week, was he?

7 A That's correct.

8 Q Okay. And were there any employees other than

9 Chavez who worked more than 40 hours a week?

10 A Yes.

11 Q Who were they?

12 A Sue Hedjak, Maivue Thao --

13 Q And these are --

14 A -- Roseanne Endvick.

15 Q And these are all employees within order

16 processing?

17 A Yes.

18 Q And --

19 A Diane -- Diana Kasprzyk. Diana is not -- is not in

20 the order processing department, but she was working

21 additional hours to help cover the work.

22 Q All right. So in your meeting with Mr. Chavez,

23 the -- was it the owner of the company was one of

24 the people in the meeting?

25 A The owner of the company had passed away.

35

1 Q Okay. Who was the individual in the meeting?

2 A Which -- which meeting?

3 Q The one -- I'm sorry. The one that we last talked

4 about when you met with Chavez to discuss the

5 covering of work, the overtime availability, and

6 the nondiscrimination training and the RIF.

7 A There were two separate meetings. The first one was

8 with Matt Chavez and his direct supervisor Margo

9 Eshleman, and the second meeting was with John Busby
10 who's the president of the company, Joe Kovacich
11 who's the vice president of administration, Matthew
12 Chavez, Margo Eshleman, and all of the other managers
13 of the nonunion departments.

14 Q Okay. The first meeting was when?

15 A Early July 2012.

16 Q And what was decided at that point with respect to
17 Ms. Wink's employment status?

18 A Nothing was decided. That was a meeting where we
19 were discussing that there were to be two reductions
20 from the order processing department, and we were
21 discussing skill and ability, work performance of
22 each of the members of the department.

23 Q And what was stated with respect to Ms. Wink
24 specifically in that first meeting?

25 A It was stated that she was a good performer, that she

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1 had the skill and ability to do numerous jobs within
2 the department and so the company viewed her as
3 flexible. As we rate people in a RIF analysis,
4 flexibility means the ability to cover multiple
5 positions. And their analysis was that they wanted
6 to retain her, and they selected two other
7 individuals for reduction.

8 Q And those were who?

9 A Kim Noonan and Roseanne Endvick.

10 Q And when were they to be eliminated?

11 A July 23rd. I think it was a Friday.

12 Q Of 2012; correct?

13 A Yes.

14 Q Meeting two, when was that?

15 A It was prior to the meeting we just discussed.

16 Q Okay. When I -- Meeting one, I attributed that to

17 be the first meeting, but you're saying that

18 meeting number one in early July 2012, was that the

19 second meeting on the topic of Ms. Wink and her --

20 whether she would continue with the company?

21 A The first --

22 Q Let's back up. Let's take it chronologically. Was

23 the first meeting chronologically about Wink's

24 status with the company in early July 2012?

25 A The first meeting was the meeting with the president

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1 of the company and the nonunion departments informing

2 them that there would be reductions from every

3 department and cuts of overtime from every department

4 and it was the nondiscrimination training for all of

5 the managers.

6 Q Okay. And when was that?

7 A It was early July 2012.

8 Q Okay. And is the second meeting the one that you
9 just covered with respect to electing to reduce two
10 other people, Roseanne and Kim?

11 A The second meeting followed the first meeting. The
12 second meeting was specific just to the order
13 processing department and it was after Matthew and
14 Margo had time to, you know, consider and evaluate
15 each of the team members and it was discussing their
16 analysis.

17 Q And when was that meeting?

18 A It was shortly after the meeting with Busby, maybe a
19 couple days.

20 Q Okay. And how many individuals did you plan on
21 reducing from the order processing department?

22 A Two.

23 Q And was it later decided that more than the two
24 would have to be eliminated?

25 A No.

38

1 Q Were Kim and Roseanne the two individuals who were
2 let go?

3 A I'm sorry, let me go back to my previous answer. You
4 said was it later.

5 THE WITNESS: Could you read back that
6 question.

7 (Requested portion read by the reporter.)

8 THE WITNESS: So not at that time it
9 wasn't decided, but there were several reductions
10 after the July 2012 reductions, and at this point
11 today there is one person left from the department
12 out of I think seven that started.

13 BY MR. OLSON:

14 Q And it's accurate to state that had Ms. Wink's
15 employment not been severed, there would have been
16 another individual who was laid off instead of that
17 separation; true?

18 MS. LORENC: Objection to form. You can
19 answer.

20 THE WITNESS: Had Tracy not voluntarily
21 resigned?

22 BY MR. OLSON:

23 Q Had her employment not ended, someone else's
24 employment there would have been ended through a
25 reduction in force; correct?

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1 A Had Tracy not voluntarily quit, the two people that I
2 mentioned would have been reduced.

3 Q I understand your argument about voluntarily quit.
4 You've got that in the record. But I'm looking at
5 her separation of employment. Had her employment
6 not ended, someone else would have been subject to

7 the reduction in force?

8 A Correct, and it would have been Kim Noonan. That was

9 the second person selected for reduction.

10 Q Okay. And then so if -- if Noonan was gone and

11 Wink was gone, then why was Roseanne also

12 eliminated?

13 A I think you're misunderstanding. The way that the

14 reduction in force evaluation is done is that each

15 team member was evaluated based on some of the

16 categories that I mentioned. We scored the employees

17 based on those evaluations. Roseanne had either the

18 highest or the lowest score, meaning that she was the

19 first person selected for reduction. Kim Noonan was

20 the second person, the next lowest score but scoring

21 better than Roseanne, so she would have been the

22 second person. Tracy was not selected for reduction.

23 Q Had Wink's employment not ended, another individual

24 would have been selected for reduction in force; is

25 that correct?

40

1 A Yes.

2 Q Now --

3 MS. LORENC: Can I just --

4 BY MR. OLSON:

5 Q -- you talked about --

6 MS. LORENC: I think you guys are getting
7 confused.
8 MR. OLSON: No. She's given an answer
9 and if --
10 MS. LORENC: Okay, you're not hearing her
11 correctly.
12 MR. OLSON: Well, you don't know what I'm
13 hearing --
14 MS. LORENC: Okay.
15 MR. OLSON: -- all right? In fact --
16 MS. LORENC: I was going to try to help
17 you but okay --
18 MR. OLSON: Please don't --
19 MS. LORENC: -- that's fine.
20 MR. OLSON: Please don't help me. Any
21 help you've provided to this point has been
22 contrary to the law and the facts.
23 BY MR. OLSON:
24 Q Here is a document that's been produced. We're
25 going to mark this as an exhibit.

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1 (Discussion held off the record.)
2 (Exhibit 4 marked for identification.)
3 BY MR. OLSON:
4 Q All right. This is marked as Barbian 4. It's a
5 document that was produced as part of the document

6 production. Have you seen this before?

7 A No, I don't know what this is.

8 Q Okay. This indicates that documents Bates labeled

9 D580 through 589 were held as privileged and I've

10 not received a log on these documents. Can you

11 identify what these documents are?

12 A I have no idea what D580 through 589 is, no.

13 MR. OLSON: Okay. So we make a request

14 to have proper identification of these documents.

15 MS. LORENC: Are you requesting a log?

16 MR. OLSON: As would be normal if you're

17 withholding documents, you need to produce a log

18 and --

19 MS. LORENC: Well, first of all, I seem

20 to recall producing one, but if that's a request

21 you want to make to an attorney and not the

22 witness, I'd certainly be happy to produce a log.

23 MR. OLSON: I'll get the information

24 through evidentiary processes however I can get it.

25 If she can't identify it, then I'd like you to do

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1 that, please.

2 BY MR. OLSON:

3 Q Ms. Wink's standard hours up to a certain point

4 were seven to three; is that correct?

5 A No, that's not correct. When she was originally
6 hired her hours were eight to four. When her son
7 started kindergarten she requested an exception to
8 her work hours, and they were modified on a temporary
9 basis to seven to three.

10 Q Okay. And who modified the hours?

11 A Her direct manager Matt Chavez.

12 Q Okay. And was that with your approval?

13 A Yes, it was.

14 Q When was that?

15 A I don't recall specifically. It was approximately
16 2010, 2011.

17 Q Was it part of her FMLA request?

18 A No, it was not.

19 Q Why did she want changed hours for her son?

20 A She wanted to either drop off or pick up her son from
21 kindergarten.

22 Q And when did those hours change?

23 A When did they change to become --

24 Q From seven to three.

25 A -- seven to --

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1 Q No, I'm sorry. When they were put -- when she was
2 put on seven to three, when did they change to
3 something else after that?

4 A We notified her of the need to change the hours to

5 eight to four on July 13th, 2012.

6 Q What did she say in response?

7 A She started crying and stormed out of the meeting and

8 didn't say anything.

9 Q So she gave you absolutely no response to the

10 suggestion that her hours would have to change from

11 seven to three to something else?

12 A Not in the meeting when we first discussed it with

13 her.

14 Q When was the first time she responded to the hours

15 change issue?

16 A When I called her after she stormed out of the

17 meeting and asked her to come back and further

18 discuss with the company the things that needed to

19 change and we discussed over the phone the hours as

20 part of that, and she explained that it was not

21 something she thought she could do.

22 Q All right. I'd like you to first of all in meeting

23 with Wink, Chavez and yourself on July 13, 2012,

24 describe as precisely and completely as you can

25 everything that was said.

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1 A We asked her to meet with us. We --

2 Q Who is we?

3 A Myself and her supervisor Matt.

4 Q Who asked her?

5 A Matt asked her to meet in HR with himself and me.

6 Q What time of day was that?

7 A Early afternoon.

8 Q Did you tell Matt to ask her?

9 A Matt and I had discussed it.

10 Q Okay. And that was discussed when? At that time

11 or sometime prior to that?

12 A What? I'm not following.

13 Q You told Matt to tell Ms. Wink that the two of you

14 would meet with her, and you said that you and Matt

15 discussed it. Did you discuss it for the first

16 time right then and there that you would meet with

17 her, or did you start that discussion earlier?

18 A We either talked about it the day before or the

19 morning of.

20 Q Was there any record of the meeting that you had

21 with Mr. Chavez about Wink the day before?

22 A No.

23 Q Was there any record of the conversation you had

24 with Mr. Chavez about Wink on July 13?

25 A No.

45

1 Q Going into the meeting what was your understanding

2 would be the subject of that meeting?

3 A The overall subject was asking Tracy for commitment

4 and commitment to things that we needed completed
5 that were being completed by other people and
6 exceptions that had been made for her which were not
7 going to continue.

8 Q Okay. And identify all of those things that would
9 not continue going -- now at this point we're going
10 into the meeting and you understood what you would
11 be covering in the meeting, so describe those
12 items, please.

13 A So first of all, it was not -- even though there had
14 been reductions that had been happening across the
15 company for years, it was not known by people that
16 there were reductions that were coming up within a
17 week or two, and so we informed her that there were
18 significant structural changes that were happening
19 across the entire company in the next couple weeks.
20 We informed her that we were asking for her
21 commitment and that we needed some things to change.

22 The first thing that we asked her that
23 we needed to change was first of all her hours of
24 work. She had been previously working seven to three
25 to pick up the son from school, and normally her

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1 hours would change eight to four in the summer, and
2 so we explained to her we needed her hours to change

3 back to eight to four. It was summer, it was July,
4 her hours hadn't changed back, so we asked for her
5 hours to become eight to four again. We explained to
6 her that the reason for the hours being eight to four
7 was that overtime was not going to be available
8 within the department or outside of the department to
9 cover the like additional hours or things that were
10 not completed.

11 We explained to her that assistance
12 from members of other departments would no longer be
13 provided, because those other departments were not
14 going to have the staffing ability to do more than
15 their own department's work. We explained to her
16 that she had been making a number of mistakes in her
17 work, and that we viewed that she was distracted when
18 she was at work because she was making excessive
19 amounts of phone calls, she was having extensive
20 conversations with coworkers during the workday, not
21 on breacktime.

22 She had previously been warned about
23 excessive conversations during the workday. We told
24 her we weren't going to continue warning her about
25 those excessive discussions. We explained to her

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1 that she had been with the department for a
2 significant amount of time, that she was more than

3 capable of prioritizing the work herself and not
4 having to be reminded by her manager of things that
5 needed to be completed. And we just asked for her
6 commitment moving forward that when she was at work
7 she would be focused at work and that her work would
8 be completed accurately and thoroughly without
9 reminder from her manager.

10 Q Okay. So you went into that meeting and you didn't
11 have any notes or talking points as to these
12 various things that you intended to cover; is that
13 accurate?

14 A We had -- we had talking points. We knew what we
15 were going to cover with her before our meeting.

16 Q Nothing in writing though; correct? You didn't
17 have any notes or any outline prepared or anything
18 like that; correct?

19 A I had an outline I was talking off of, yes.

20 Q Okay. Where is that outline?

21 A I mean I have the outline.

22 Q You do?

23 MS. LORENC: I'm going to object to the
24 extent this calls for attorney-client privilege,
25 but you can answer to the extent it does not.

2 Q Okay. Did your legal counsel help you with the
3 outline?

4 A He reviewed the outline.

5 Q Okay. Who is he? Mr. Lynch or someone else?

6 A Larry Lynch.

7 Q Okay. And the reason he reviewed it is that the
8 issue of FMLA was present; true?

9 A I asked him to review it because we wanted to
10 continue allowing Tracy the ability to attend doctors
11 and therapy appointments, and we didn't want to be
12 asking her to do something that was contradictory
13 towards allowing her FMLA.

14 Q Okay. Now, I had asked your legal counsel to
15 identify whether there were any notes, and the
16 answer came back there were not. I don't know if
17 these documents, 580 through 589, are those notes,
18 but it's accurate to state that Attorney Lynch
19 looked at the notes, but he didn't change anything
20 on the notes, did he?

21 A No.

22 Q Okay. And those were -- that outline was something
23 that you created; correct?

24 A It's something I created in discussion with him.

25 Q Okay. You created it and then showed it to him was

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1 your testimony. Is that accurate?

2 A Yes.

3 Q Okay. You created it before you talked to him;

4 true?

5 A No, I created it on the phone with him.

6 Q Okay. And so that outline was to make sure that

7 you would not run amiss of FMLA requirements; true?

8 A Correct.

9 Q Okay. And so Attorney Lynch was aware at that time

10 that you -- strike that -- that Ms. Wink had

11 already been certified for FMLA entitlement; true?

12 A Yes.

13 Q And the records then -- or the outline that you

14 went through, that just contained talking points

15 with Ms. Wink; true?

16 A Yes.

17 Q And were you aware that once you discuss the items

18 in a document prepared by a lawyer, that the

19 privilege is waived and it no longer applies?

20 MS. LORENC: Objection, calls for legal

21 conclusion.

22 MR. OLSON: So you're objecting to form.

23 BY MR. OLSON:

24 Q But in all your experience as an HR professional,

25 are you aware that attorney-client privilege no

1 longer applies once you share that communication
2 with another third party?

3 MS. LORENC: Same objection. She's not
4 an attorney.

5 MR. OLSON: Okay. I want that document.
6 The privilege is waived --

7 MS. LORENC: You can want it all you
8 want.

9 MR. OLSON: Well, if you don't produce it
10 there's going to be a motion for sanctions, so take
11 it seriously, please.

12 MS. LORENC: I take it very seriously.

13 MR. OLSON: Yeah, because I've asked for
14 it.

15 MS. LORENC: It's privileged.

16 MR. OLSON: I've asked for it and you
17 told me there were no notes.

18 MS. LORENC: You asked for handwritten
19 notes and that's different.

20 MR. OLSON: No, no, no.

21 MS. LORENC: And I also produced a
22 privilege log which I will get to you, but asking
23 for --

24 MR. OLSON: I'm not going to -- I'm
25 keeping this deposition open until these documents

1 are produced. I want to make that clear. And
2 there may be a motion for sanctions because
3 documents that are clearly not privileged have been
4 withheld.

5 MS. LORENC: And I disagree that they're
6 clearly not privileged. She just testified that
7 she --

8 MR. OLSON: Well, you're familiar with
9 the waiver privilege.

10 MS. LORENC: I am.

11 MR. OLSON: She just testified, and
12 you're probably aware, that she shared them with my
13 client.

14 MS. LORENC: She did not just testify
15 that she shared them with your client.

16 BY MR. OLSON:

17 Q Did you cover the talking points on your notes with
18 my client?

19 A Yes, I used the outline for my discussion with her.

20 Q Thank you.

21 MR. OLSON: By withholding documents
22 you're interfering with our discovery and you're
23 jacking up the cost of this litigation.

24 MS. LORENC: Is there a question there?

25 MR. OLSON: It's a statement to put you

1 on notice that if this information is not produced,
2 I will move for sanctions.

3 MS. LORENC: Well, you first have to
4 bring a motion to compel the production of
5 privileged documents before you can go anywhere
6 near --

7 MR. OLSON: I just learned of it now
8 unfortunately because you misrepresented the facts
9 to me.

10 MS. LORENC: That is not accurate. We
11 have never had a conversation about these
12 privileged documents.

13 MR. OLSON: Right, because I only asked
14 for handwritten notes; is that your contention?

15 MS. LORENC: That's my recollection of it
16 right now.

17 MR. OLSON: Right, I said handwritten
18 notes and I didn't want any other notes if they
19 were typed, is that correct?

20 MS. LORENC: My recollection, if you'll
21 let me speak before interrupting me since there's a
22 court reporter taking this down, is that you
23 specifically requested any handwritten notes. I --
24 I researched whether such things existed and
25 determined that we didn't have any.

1 I still stand by my contention that
2 the outline that was prepared in conjunction with
3 oversight from an attorney is privileged. She has
4 not indicated that she produced a copy of that
5 outline to your client, nor that she read it
6 verbatim. She said she used it to cover the talking
7 points. I don't think that amounts to a waiver of
8 any attorney-client privilege.

9 MR. OLSON: All right. What you're
10 describing is a very sharp practice, and it will be
11 dealt with in due course.

12 BY MR. OLSON:

13 Q Is it accurate to state that on days that Ms. Wink
14 was working from home, she would pick up work in
15 the morning after she dropped off her son at
16 school?

17 MS. LORENC: Objection to form. You can
18 answer.

19 THE WITNESS: I have no idea what the
20 specifics of that arrangement was.

21 BY MR. OLSON:

22 Q Now, when you told Chavez to summon Wink to a
23 meeting, you met with Wink. How long was that
24 meeting?

25 A Less than five minutes.

- 1 Q Where was the meeting?
- 2 A In my office.
- 3 Q It was the three of you?
- 4 A Yes.
- 5 Q Was the meeting recorded in any way, in writing or
- 6 a device or anything else?
- 7 A No.
- 8 Q Did you put down any notes during the meeting?
- 9 A No.
- 10 Q So when she stormed out you didn't write anything
- 11 down on your notes?
- 12 A No.
- 13 Q You didn't record the time or anything like that?
- 14 A No.
- 15 Q When is the last time you looked at those notes?
- 16 A It's been quite a while.
- 17 Q You looked at those this morning, didn't you?
- 18 A I looked at the outline.
- 19 Q Right. That's what we're talking about; right?
- 20 That's what you had in the meeting with my client.
- 21 That's what you -- Those are the points you covered
- 22 with her; true?
- 23 A Correct.
- 24 Q And you looked at those this morning?
- 25 A Correct.

- 1 Q Do you consider this morning to be some time ago?
- 2 A Because I -- I didn't read through them in detail.
- 3 Q Okay. So you skimmed those; is that right?
- 4 A Yes.
- 5 Q And it's your testimony there are no handwritten
- 6 notes on that outline?
- 7 A There are no handwritten notes on it.
- 8 Q So what were the points that you covered with
- 9 Ms. Wink before she left the meeting? Did you go
- 10 through all of them or some of them?
- 11 A We only went through the first two which were the
- 12 need for her hours of work to change, and that there
- 13 would no longer be assistance from a member of a
- 14 different department to cover her workload.
- 15 Q And the next communication you had with Ms. Wink
- 16 was when you called her?
- 17 A Yes.
- 18 Q How long was that conversation?
- 19 A It was probably 15, 20 minutes.
- 20 Q Was Mr. Chavez with you when you made that call?
- 21 A No.
- 22 Q Did you call from a work phone, cell phone,
- 23 something else?
- 24 A Work phone.
- 25 Q And you reached Ms. Wink on her phone?

- 1 A Yes.
- 2 Q Was she on her cell phone?
- 3 A It's whatever -- I have no idea.
- 4 Q Okay. Do you know if she was traveling at the
- 5 time?
- 6 A I have no idea.
- 7 Q What did you say to Wink and what did she say to
- 8 you?
- 9 A I said, Tracy, why did you storm out of the meeting;
- 10 you can't just leave work without permission. And
- 11 she said, I'm sorry, I lost control of my emotions, I
- 12 just had to get out of there. And I explained to her
- 13 that we hadn't finished the meeting, that there were
- 14 important things that Matt and I needed to discuss
- 15 with her.
- 16 I went through with her over the phone
- 17 the points that I gave you earlier, and I asked her
- 18 to think about it over the weekend. Told her I
- 19 wasn't asking for an answer at that point but to
- 20 think about it over the weekend and to meet with Matt
- 21 and myself on Monday and let us know if those were
- 22 things that she could commit to. And that was it.
- 23 Q What did she say?
- 24 A She said, okay, she would give it some thought and

25 then she would meet with us Monday.

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1 Q Was she still upset when you talked to her on the
2 phone?

3 A No, she was much more calm.

4 Q Was that your intent that if she complied with your
5 requirements, she would continue her employment at
6 the company?

7 A Absolutely, yes.

8 Q And the requirement would be that she would no
9 longer be working from home two days out of the
10 week; correct?

11 A Correct.

12 Q And her being at home two days out of the week,
13 that was part of her FMLA; is that correct?

14 A No, that's not correct.

15 Q Okay. So did you ever look at her FMLA papers?

16 A Yes, I looked at them.

17 Q When did you first look at her FMLA paperwork?

18 A I don't recall specifically. It was after it was
19 initially certified and at some point during one of
20 the recertifications.

21 Q What is your job with respect to the FMLA process
22 at that time?

23 A I don't certify the paperwork. I don't typically
24 handle leaves of absences unless the person who

25 handles them was gone.

58

1 Q Okay. Those are the things you don't do. What I
2 asked is what is your involvement with the -- how
3 does your job relate to the FMLA?

4 A I work with the managers to make sure that they are
5 able to cover the workload of the department with
6 whatever absence is occurring. If there is a
7 question from the person who handles the paperwork, I
8 get involved in answering -- fielding questions, so
9 if she's not certain if something would be covered or
10 not, then I would have --

11 Q She being Peggy Malmstadt?

12 A Correct. Then I would get involved in answering
13 that.

14 Q Do you train your employees that when they are
15 disciplining an employee, they have to document it
16 accurately?

17 MS. LORENC: Objection to form. You can
18 answer.

19 THE WITNESS: When a manager is
20 disciplining an employee, first of all, they have
21 to get approval from a member of HR to issue a
22 discipline. The discipline is written together
23 between the manager and the HR member before it's

24 issued to the employee. And depending on the level
25 of discipline, sometimes it involves a third party

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1 observing the discipline being given.

2 BY MR. OLSON:

3 Q And it's important that the documentation
4 concerning the discipline be accurate?

5 A Correct.

6 Q And is the discipline put in the employee's
7 personnel file?

8 A Yes.

9 Q And is it important that all of the information
10 that goes into the employee's personnel file be
11 accurate?

12 A Yes.

13 Q Was Miller Compressing bought by another company?

14 A Yes.

15 Q When was that?

16 A September 28th, 2012.

17 Q What company?

18 A Alter Trading Corporation.

19 Q What involvement did you have in that purchase if
20 any?

21 A A significant amount. I was part of the due
22 diligence team for Miller Compressing. I was part of
23 the transition process between both the former

24 management group Miller Compressing and the current
25 ownership group Alter Trading. I was part of

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1 reduction decisions before and after the acquisition.
2 I was part of communication meetings with employees
3 about what was happening.

4 Q Tell me about the due diligence with respect to
5 communication with the purchaser. Were you
6 responsible for generating reports?

7 A Not necessarily reports but documents.

8 Q The new company, the purchasing company, had asked
9 for documentation of employees who were using FMLA;
10 correct?

11 A I don't think that they requested that.

12 Q Did you provide that information?

13 A I don't believe so.

14 Q So the sale was completed in September of 2012.
15 When did the due diligence begin for that purchase?

16 A Gosh. It's difficult to remember specifically
17 because the company had been for sale since 2006 so
18 we were in -- in what I would call an ongoing due
19 diligence process with numerous potential buyers.

20 Q And when did Alter first come?

21 A 2007.

22 Q Would it be accurate that you were doing due

23 diligence on behalf or with Alter since '07?
24 A Yes. It wasn't ongoing with Alter. They initially
25 decided not to buy the company in 2007, 2008, and

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1 then they started looking at the company again in --
2 somewhere between 2011 and 2012.

3 Q In your telephone conversation with Ms. Wink, she
4 told you that she did not think she'd be able to
5 make arrangements for her son on such short notice;
6 correct?

7 A Correct.

8 Q And the arrangements with her son would be to have
9 somebody who could look after him on the two days
10 per week that she was at home; true?

11 A I -- I don't recall specifically what arrangements
12 that she had to arrange. She just said she didn't
13 know if she could do it on such short notice.

14 Q Okay. You knew that she was caring for her son two
15 days a week; true?

16 A I knew that she was telecommuting for two days a
17 week.

18 Q You knew that she had applied for FMLA that related
19 to her son; true?

20 A Correct.

21 Q And you knew that she was caring for her son two
22 days a week; true?

23 A I knew that she was telecommuting two days a week. I
24 don't know which time she was caring --
25 Q So you're --

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1 A -- for her son specifically.
2 Q You're denying on the record that you had any
3 knowledge that Ms. Wink was caring for her son two
4 days per week pursuant to her FMLA leave; true? I
5 want to make this really clear. You're denying on
6 the record that you had any knowledge whatsoever
7 that Ms. Wink's FMLA certification was related to
8 her caring for her son two days per week; is that
9 accurate?
10 A Her certification was to care for her son for
11 whatever his condition was. She had requested to
12 telecommute from home. I don't know specifically
13 which days she was taking him to doctors'
14 appointments and therapy appointments because I was
15 not administering her FMLA. That was administered by
16 someone else.
17 Q Ms. Malmstadt?
18 A Correct.
19 Q So you never even talked to Ms. Malmstadt to
20 identify what her FMLA needs were before you talked
21 to her about what things you were taking away from

22 her?

23 A I knew that she had intermittent leave time. I knew

24 --

25 Q Hold on. Hold on. That's not what I asked though.

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1 I asked whether you talked to Malmstadt. Did you

2 go to Malmstadt and figure out what the parameters

3 of the FMLA requirements were for Ms. Wink before

4 you went to Wink and said we're taking away these

5 four or five items?

6 A I talked to her about what the FMLA certifications

7 were. I then talked with our attorney about what

8 those certifications were.

9 Q Did you look at the certifications?

10 A I looked at them with him, yes.

11 Q Okay. And so did you look at all of the FMLA

12 documents in the file?

13 A Yes.

14 Q Okay. So you knew from those records what the

15 parameters of the FMLA were; true?

16 A Yes.

17 Q And in your mind you didn't -- it was clear to you

18 you didn't need additional information from anyone

19 to understand what the parameters of the FMLA leave

20 consisted of; is that accurate?

21 A At that point, no, I didn't need additional

22 information.

23 Q Okay. And you didn't ask Wink for additional

24 information?

25 A No.

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1 Q Okay. So when you spoke to Wink on the phone, she

2 told you that she was caring for her son two days a

3 week; true?

4 A She -- her response to me in that conversation was

5 that she needed to make other arrangements for her

6 son, and she didn't know if she'd be able to do it on

7 such short notice. She did not go into detail about

8 what that was.

9 Q Well, you knew that she was home with her son two

10 days per week; right?

11 A I knew that she was telecommuting two days per week.

12 Q Okay. So again, I'm right back to square one. I

13 want you to state on the record you had no

14 knowledge that Ms. Wink took FMLA for two days a

15 week so that she could be home with her son

16 regarding his serious health condition. Is that

17 your --

18 MS. LORENC: Objection --

19 BY MR. OLSON:

20 Q Is that your -- is that your testimony, you had no

21 knowledge of that; is that accurate?
22 MS. LORENC: Objection to form.
23 THE WITNESS: You're asking me to infer
24 things that I do not specifically recall. I
25 recall --

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1 BY MR. OLSON:
2 Q Okay.
3 A -- seeing her certification. I've seen numerous
4 certifications --
5 Q All right.
6 A -- for multiple employees. I don't remember
7 specifically her certification.
8 Q So sitting here today you don't remember whether
9 you were aware that Ms. Wink had FMLA for purposes
10 of caring for her son two days per week because of
11 his serious health condition; is that accurate?
12 A That's accurate. I don't remember that specifically.
13 Q Okay. What would you look at to refresh your
14 memory on that?
15 A I would look at the FMLA certification which I didn't
16 review or I would have informed you of that when you
17 asked me which documents I reviewed.
18 Q So in preparation for your deposition today, you
19 looked at the discovery responses by the company
20 but you didn't look at the certification?

21 A Correct.

22 Q Okay. Well, we'll cover that.

23 Now, you said that you wanted to let

24 Wink know that there were going to be some layoffs.

25 Why did you let her know individually rather than

66

1 doing it with a group of people that were in the

2 order processing department?

3 A I think you misunderstood what I earlier stated. I

4 did not inform her that there were going to be

5 layoffs. I informed her that there were significant

6 changes that were coming.

7 Q Okay. And why did you do that in contrast to

8 meeting with the order processing people as a

9 group?

10 A Because the company wanted to get her commitment that

11 she would be a continuing member of the department.

12 We did not want to layoff an individual if she wasn't

13 able to make that commitment.

14 Q And if she couldn't make the commitment, then she

15 would be laid off; true?

16 A No. If she couldn't have made that commitment, we

17 would have discussed that with our attorney. It

18 never occurred to us that she would not be able to

19 make that commitment.

20 Q Well, she told you she couldn't make the
21 commitment; right?
22 A On Friday afternoon she said she didn't know if she
23 would be able to do that and she would be working on
24 it over the weekend.
25 Q And she told you that on Monday as well?

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1 A On Monday she said she was quitting, she couldn't --
2 Q Well, she told --
3 A -- make the commitment.
4 Q Right. So the commitment was that she had to be in
5 the office five days a week; true?
6 A Correct.
7 Q And she told you --
8 A I'm sorry, that's not correct. The commitment was
9 that she would be in the office when -- when --
10 between Monday through Friday, eight to four, except
11 for doctors' and therapy appointments to take care of
12 her son.
13 Q So the requirement was she had to be in the office
14 from eight to four five days a week unless there
15 was a doctor's appointment?
16 A Doctor or therapy appointments or other FMLA event.
17 Q Okay. But not to -- she couldn't be home to care
18 for her son?
19 MS. LORENC: Objection to form.

20 BY MR. OLSON:

21 Q True?

22 MS. LORENC: You can answer it.

23 THE WITNESS: We said she needed to be in
24 the office Monday through Friday, eight to four,
25 other than FMLA events to care for her son.

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1 BY MR. OLSON:

2 Q Okay. Well, that's different now. So you said
3 generally FMLA events; is that correct?

4 A Yes.

5 Q And that covered her being home two days a week
6 with her son?

7 A It covered doctors' and therapy appointments for her.

8 Q Did it exclude her being home two days a week with
9 her son as she had been doing all along?

10 A Yes, she was needed to be in the office.

11 Q All right. And you gave her no written notice of
12 that requirement, did you?

13 A No.

14 Q Who were the employees that you wanted the
15 commitment from who were in order processing?

16 A Tracy was the only employee who had numerous
17 exceptions that we needed to meet with in the order
18 processing department, but there were others we met

19 with in other departments.

20 Q Okay. So how many individuals did you want to make

21 a commitment to not work -- to be in the office to

22 do the things necessary so other departments didn't

23 have to work overtime?

24 A Four.

25 Q And of those four then there were two that were let

69

1 go, or were there six and two were let go?

2 A I'm not following your question.

3 Q Okay. Were the two individuals who were let go

4 from the order processing department?

5 A Yes.

6 Q And those two individuals, are you including those

7 within the four or were they in addition to the

8 four you just mentioned?

9 A Your question to me was how many people did I have a

10 discussion with about making a commitment.

11 Q Well, I wanted to know --

12 A And they weren't --

13 Q -- how many you needed to make the commitment.

14 (Reporter interruption.)

15 THE WITNESS: I said the question was how

16 many people did we have a discussion with about

17 their commitment and needing them to change what

18 their commitment was to work.

19 BY MR. OLSON:

20 Q Okay.

21 A And that answer is four.

22 Q Okay. And of those four how many discontinued
23 employment?

24 A One.

25 Q Who was that?

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1 A Tracy.

2 Q And there were others who you knew would not make
3 the commitment or they had not up to that point?

4 A No, the other three made the commitment.

5 Q There were -- there were other employees within
6 order processing that you had decided had not been
7 committed up to that point?

8 A No, Tracy was the only one within that department.

9 Q When was the next time after Tracy's employment
10 ended that anyone in order processing separated
11 employment?

12 A The two individuals who were position eliminated.

13 Q Okay.

14 A And it was July 23rd, on or about.

15 Q Okay. And when did you decide that those two
16 individuals would be eliminated?

17 A I'm sorry. It was actually one individual, because

18 when Tracy had quit we didn't reduce the second
19 individual, and we had decided that -- we had decided
20 on the two prior to having the discussion with
21 Tracy -- it was about a week prior -- and then after
22 Tracy quit we -- we decided that we were only going
23 to cut the one. Since Tracy had left it was already
24 one headcount reduction.
25 Q Who was the one who was cut?

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1 A Roseanne Endvick.
2 Q And who was the one who was kept?
3 A Kim Noonan.
4 Q And was Noonan later cut?
5 A Yes.
6 Q When?
7 A Six to ten months after.
8 Q How long was the conversation with Ms. Wink on
9 Monday morning?
10 A It was very short.
11 Q That was July 16th, 2012?
12 A Yes.
13 Q And who was present at that?
14 A Myself and Matt.
15 Q And her?
16 A Correct.
17 Q In person?

18 A Yes.
19 Q Again, in your office?
20 A Yes.
21 Q Was that meeting recorded in some manner?
22 A No.
23 Q Did you have an outline that you would cover in
24 that meeting?
25 A No.

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1 Q You didn't use your prior outline that you went
2 over with Lynch?
3 A No.
4 Q What was the purpose of that meeting?
5 A To hear if Tracy was able to make the commitment or
6 not.
7 Q All right. And so how long was the meeting?
8 A Five minutes or less.
9 Q And did she punch in for the meeting if you know?
10 A I think she did. I'm not certain.
11 Q Okay. And I want you to describe as completely and
12 accurately as you can everything that was said in
13 that meeting.
14 A We sat down. Tracy looked at us and said she wasn't
15 able to do the changes on a going-forward basis, and
16 she wanted to know where we go from here. We

17 informed her we were sorry to hear that; we didn't
18 know where we went from there. We told her she
19 could, you know -- I think she asked if she could go
20 home that day, if she had to keep working that day.
21 We told her that she could go home, we would have
22 discussions internally about what that meant going
23 forward and we'd get back to her. And that was it.
24 Q Okay. What was her emotional state in that
25 meeting?

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1 A Fine.
2 Q She told you in that meeting that she could not
3 make arrangements for her son two days per week;
4 correct?
5 A She just said that she couldn't make the commitment
6 that we were asking.
7 Q That's all she said? She didn't give you any
8 details at all?
9 A She didn't go into detail, no.
10 Q When is the last time you spoke with Matt Chavez by
11 the way?
12 A I spoke with him a couple of weeks ago to let him
13 know that he was being requested for a deposition
14 giving him the date and time.
15 Q Okay. Nothing since then?
16 A (Witness shook head.)

17 Q Did you talk to him about the case?

18 MS. LORENC: Did you say no?

19 THE WITNESS: Sorry. No. I just

20 realized that. Pardon?

21 BY MR. OLSON:

22 Q Did you talk to him about the case?

23 A I told him that a charge had been filed. I told him

24 that we believed he was likely to be asked to give a

25 deposition. And that was it.

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1 Q Did you talk to him about my efforts to reach him?

2 A I don't know about your efforts to reach him.

3 Q Okay. Did he say anything about my trying to call

4 him?

5 A I don't speak to Matt.

6 Q Okay. How did you reach him? You called him?

7 A I called him.

8 Q Okay. And that was a number that you had on file

9 in your office?

10 A Yes.

11 Q Okay. Has that number changed?

12 A No, not to my knowledge.

13 Q So that was back -- You got his address and phone

14 number from his personnel file?

15 A Yes.

16 Q Okay. When did he last work at the company?

17 A I think it was the end of February 2014.

18 Q Was he laid off?

19 A Yes.

20 Q Were you aware that Ms. Wink's son had a form of
21 autism?

22 MS. LORENC: Objection to form. You can
23 answer it.

24 THE WITNESS: Not initially. When she
25 initially applied for FMLA, they did not have a

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1 diagnosis or condition, but I was informed later
2 that, you know, he had been diagnosed, yes.

3 BY MR. OLSON:

4 Q Let me ask you a couple questions that are somewhat
5 personal but I think they could be related. Do you
6 have any children?

7 A No.

8 Q Have you taken any FMLA leave from Miller
9 Compressing?

10 A Yes.

11 Q When was that?

12 A This past year.

13 Q In 2014?

14 A Correct.

15 Q Okay. Nothing before that?

16 A No.

17 Q Okay. Was that solid leave or intermittent leave

18 that you took?

19 A Solid. And then when I returned it was probably a

20 week intermittent.

21 Q When did you learn that Ms. Wink's son had a form

22 of autism?

23 A I don't recall specifically. It was sometime during

24 her leave.

25 Q Was she talking to her coworkers about her son's

76

1 autism?

2 A She was having numerous personal conversations with

3 her coworkers. I don't know what about specifically.

4 Q Did anyone complain about that?

5 A Several people complained.

6 Q To you?

7 A Yes.

8 Q Who were they?

9 A Jackie Smith, Mary Krecak, John Busby, Joe Kovacich,

10 Phil Heston, Matt Chavez, Margo Eshleman, Tom Kaerek.

11 And I observed it myself firsthand.

12 Q And was she disciplined for that?

13 A Yes.

14 Q When was she disciplined for that?

15 A I have had repeated conversations with Tracy and a
16 couple others over the past five to six years about
17 her excessive personal conversations with coworkers.
18 Q Okay. So with all those conversations then I
19 assume that the discipline progressed through the
20 progressive discipline policy?
21 A It did not. We continued giving her verbal warnings
22 and telling her it needed to improve or that it would
23 be, you know, the next disciplinary step.
24 Q When was the last time you gave her a verbal
25 warning? Was it on July --

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1 A July 13.
2 Q -- 13?
3 A Yes.
4 Q Prior to that when was the last time?
5 A It was probably about six months before that.
6 Typically what would happen is we would have a
7 conversation with her and whichever coworkers there
8 was an issue with, it would improve, and then it
9 would regress and we'd have to have a conversation
10 again.
11 Q Okay. And you say we. That would be you and
12 Mr. Chavez?
13 A Yes.
14 Q All right. And is there any documentation of the

15 discussions about her talking to her coworkers?
16 A I believe that there is some documentation, yes.
17 Q And those personal conversations were about her
18 son's autism and his medical care?
19 A I don't think so because many of those conversations
20 were before she was on FMLA leave.
21 Q Were any of the conversations about her son's
22 autism and medical care?
23 A I would assume so but I don't know specifically.
24 Q Okay. Were people asking her how her son was
25 doing --

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1 A I would --
2 Q -- that you're aware of?
3 A I would assume.
4 Q Okay. Was she expected not to provide an answer if
5 she was in the workplace?
6 A No.
7 Q Okay. Did she ever communicate to you that people
8 including Mr. Busby were asking her about her son's
9 status?
10 A Yes.
11 Q Was there any effort to document when she was
12 getting personal calls regarding her son's autism
13 or the medical care?

14 A No.

15 Q Did any employees document their complaints about
16 her phone usage, in other words, send you an e-mail
17 or something?

18 A No, typically they would pull me aside and say that
19 they had observed Tracy having an extensive
20 conversation either behind a closed door or just on
21 the phone with a coworker, or I would observe it
22 firsthand when I walked up to the second floor
23 because that's where the president's office was, and
24 so when I walked past I would see her standing and
25 talking for the entire duration that I was in his

79

1 office, and he would comment to me that from his
2 office he could see her standing and talking many
3 times throughout the day.

4 Q In a conference room behind a closed door?

5 A She -- What do you mean?

6 Q Would she go into a room and close the door to talk
7 on the phone?

8 A Yes.

9 Q Okay. And --

10 A She would also -- She would also just call from her
11 desk which was an open area.

12 Q Okay. Now, she had told you that she needed to be
13 in contact with her son's health care providers; is

14 that correct?

15 A Yes.

16 Q Okay. And was there any exception for that?

17 A Yes, that was an exception.

18 MR. OLSON: Okay. We've been at this now
19 for an hour and a half. Why don't we take a short
20 break and then we can reconvene.

21 (Recess taken from 10:35 until 10:58 a.m.)

22 (Exhibit 5 marked for identification.)

23 BY MR. OLSON:

24 Q Exhibit 5 is entitled Miller Compressing Company
25 Job Description, order processing, Bates stamp

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1 D675, 676. Can you identify whether this is the
2 job description for the position that Ms. Wink last
3 held?

4 A Yes, it is.

5 Q And did you participate in the drafting of this?

6 A No.

7 Q When did you start with Miller by the way?

8 A May 23rd, 2003.

9 Q Could you describe your job progression there.

10 A Sure. I started as an HR generalist, and then was
11 promoted to HR manager when the former manager took a
12 different position around 2005, and then was promoted

13 to HR director shortly thereafter and that's my title
14 since.
15 Q And as of 2012 how many direct reports did you
16 have?
17 A Four. I'm sorry; 2012 when?
18 Q Tell me when it changed.
19 A It changed after Alter acquired us. Prior to that I
20 had three. After that I had four.
21 Q Okay. So the formal Alter acquisition was
22 September 23 of 2012?
23 A September 28, 2012.
24 Q Okay. So pre-acquisition you had how many direct
25 reports?

81

1 A There are two direct reports, three people total in
2 the department.
3 Q Okay. And who were they?
4 A Peggy Malmstadt and Carla Lasee. Actually -- I'm
5 sorry -- Carla started in October of -- it was Alan
6 Dahl, not Carla. Carla replaced Alan later.
7 Q How do you spell Carla's last name?
8 A L-A-S-E-E.
9 Q Okay. And what was Carla's job?
10 A HR coordinator.
11 Q What did that person have to do with FMLA if
12 anything?

13 A Nothing.

14 Q The same would be true for Alan Dahl?

15 A They were in the same position.

16 Q When did Malmstadt start with the company?

17 A I think it was around 2010.

18 Q Have you had conversation with her about this case?

19 A Just that it was filed. And she helped produce the

20 FMLA documents I think we provided in discovery.

21 Q Getting back to Exhibit No. 5, is there anything in

22 this document you're aware of that is missing from

23 the job duties that were performed by Ms. Wink?

24 A That would better be answered by Matt, but I'll take

25 a look at it.

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1 Q I'll cover it with Matt.

2 A Okay.

3 Q But off the top of your head are you aware of

4 anything that may be missing?

5 A No, but I would probably have modified under

6 essential duties and responsibilities customer

7 service to specifically include answering incoming

8 customer inquiries about pricing and freight.

9 (Exhibit 6 marked for identification.)

10 THE WITNESS: Are these for me or are

11 these --

12 BY MR. OLSON:

13 Q Those are for the court reporter.

14 A Okay.

15 Q Exhibit No. 6 is Answer and Affirmative Defenses to
16 Amended Complaint. Take a look at this document,
17 and I'd like to ask you a question after that.

18 A Okay.

19 Q Have you seen it before?

20 A Yes.

21 Q Did you review it before it was filed with the
22 court?

23 A I don't know that I reviewed it before it was filed,
24 but I provided information that Susan used to file.

25 Q Okay. Looking at page 11 under Affirmative

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1 Defenses, it says that she failed to mitigate her
2 damages which would be reduction of her damages.

3 Are you aware of any facts that
4 would indicate she failed to reduce her damages?

5 MS. LORENC: Objection to form but you
6 can answer.

7 THE WITNESS: I think that's a legal term
8 that I am quite honestly not familiar with.

9 BY MR. OLSON:

10 Q Okay. Looking at B, the actions that were -- it
11 says the actions taken by the company were its

12 financial conditions, company-wide reorganization,
13 and ongoing reductions in force.

14 Do you agree with that?

15 A Absolutely.

16 Q Any of the other employees that you sought
17 commitment from, the group of four you identified
18 with Ms. Wink, had any of them exercised FMLA
19 rights?

20 A Margo had previously.

21 Q How long prior?

22 A A couple of years prior.

23 Q Okay. For how long?

24 A Several months.

25 Q But it was not ongoing intermittent leave at the

84

1 time of Ms. Wink's separation; is that accurate?

2 A Yes.

3 Q Margo's last name again is what?

4 A Eshleman.

5 Q Okay. Any other employees who were within that
6 group of four who had exercised FMLA rights?

7 A Jeff Granger had previously exercised FMLA rights but

8 --

9 Q He was one of the four?

10 A Yes.

11 Q How long prior?

12 A Probably 15 years prior.

13 Q Okay. Anyone else?

14 A No.

15 (Exhibit 7 marked for identification.)

16 BY MR. OLSON:

17 Q Exhibit 7 is Miller Compressing Company Application
18 for FMLA Leave of Absence dated July 13, 2011, Bate
19 stamped Wink 14. Have you seen this document
20 before?

21 A Yes.

22 Q When was the first time you saw it?

23 A I don't recall specifically. It was after she
24 completed it.

25 Q Was it sometime around then?

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1 A It would have been within a couple of weeks of
2 July 13th, 2011.

3 Q Okay. And in the upper right corner where it says
4 intermittent leave, do you recognize that
5 handwriting?

6 A Yes.

7 Q Whose is it?

8 A Peggy Malmstadt's.

9 Q Did you have a discussion with Peggy Malmstadt
10 around this time as to the request -- or the

11 application rather?

12 A Only that she told me as an FYI Tracy had applied for

13 intermittent leave and it had been approved.

14 Q All right. And what is the process followed to

15 approve a leave?

16 A We follow --

17 MS. LORENC: Objection to form. You can

18 answer.

19 THE WITNESS: We follow the same process

20 and paperwork that the federal FMLA follows so we

21 use all of their forms.

22 BY MR. OLSON:

23 Q Okay. So there's a written document that expresses

24 to the employee that their leave has been approved;

25 is that correct?

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1 A Yes.

2 Q And you understand that's required by the FMLA?

3 A Yes.

4 Q And do you know of such document that exists for

5 the approval of this application for leave?

6 A I'm sure that it was sent to Tracy at her home

7 address.

8 Q And it would have been kept in her FMLA file by

9 Ms. Malmstadt as well?

10 A I believe so.

11 Q But sitting here today do you have any specific

12 knowledge of such a form?

13 A I didn't review the FMLA forms before today.

14 Q That's not what I asked you. Sitting here today do

15 you have any specific knowledge of such a form?

16 A No.

17 Q And did you discuss with Ms. Malmstadt the reason

18 why she needed intermittent leave?

19 A She -- Peggy had informed me that Tracy had some

20 medical issues going on with her son and she needed

21 time off to attend appointments to determine what the

22 issue was.

23 Q In the preparation for the discussions with

24 Ms. Wink on July 13 and 16, 2012, did you have any

25 discussion with Ms. Malmstadt about Wink's

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1 employment status?

2 A About her employment status --

3 Q Right.

4 A -- no.

5 Q Did you have any discussion with her about

6 documents concerning Wink?

7 A I asked her to give me a copy of the FMLA documents

8 so I could share them with our attorney.

9 Q And those were kept in a file maintained by

10 Ms. Malmstadt?

11 A Yes.

12 Q And those are kept separate from the personnel

13 file?

14 A Yes, they're kept in the medical records room.

15 Q And the file folder, what does that look like if

16 you know?

17 A All of the medical leave folders are red folders.

18 Q All right. And is there writing on the outside of

19 the folder, for --

20 A No.

21 Q -- example, when somebody pulls a file or something

22 like that?

23 A No.

24 Q Are there notations inside the file on the jacket

25 itself?

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1 MS. LORENC: Objection to form. You can

2 answer.

3 THE WITNESS: No. There's a label on --

4 the file label that just says employee name, FMLA,

5 short-term disability, worker's comp., and the

6 date.

7 BY MR. OLSON:

8 Q Okay. When you got the FMLA paperwork from Wink's

9 file through Malmstadt, did she make you a copy or
10 did she hand you the file; how did that work?
11 A She -- I don't remember if she made me a copy or
12 scanned it to me.
13 Q So she may have e-mailed it to you?
14 A One of the two.
15 Q Okay. And so around the time that you discussed
16 this application with Ms. Malmstadt, was that
17 pursuant to one of those weekly discussions that
18 you mentioned earlier?
19 A Yes.
20 Q And at this time do I recall correctly you didn't
21 know what the diagnosis was for her son?
22 A I don't think anyone knew at that time.
23 Q And what specifically was Wink asking for if you
24 know at this time?
25 A Just time off to attend doctor appointments for

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1 assessments.
2 Q She had not been working from home up to this
3 point?
4 A I don't remember the specific date when she started
5 working from home.
6 (Exhibit 8 marked for identification.)
7 BY MR. OLSON:
8 Q Exhibit 8 is a series of documents marked Wink 15

9 through 20. There's a fax cover sheet on Miller
10 Compressing letterhead with a date stamp at the top
11 of March 1, 2012. Take a look at these documents
12 and then I'll have questions for you.

13 When is the first time you saw this
14 packet of documents?

15 A Shortly after it was received.

16 Q And what was the context of that?

17 A Peggy Malmstadt just informed me that we had received
18 the recertification paperwork and informed me what it
19 said.

20 Q Did you look at the documents?

21 A Not at the time it was received. She just told me
22 about them, showed me the copy, but I didn't read
23 through them.

24 Q And then later when -- before you talked to
25 Attorney Lynch, you again looked at these documents

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1 when Malmstadt provided them to you in the file --

2 A Yes.

3 Q -- or from the file I should say?

4 MS. LORENC: Objection to form but you
5 can answer.

6 THE WITNESS: Yes.

7 BY MR. OLSON:

8 Q And was this the first time that you learned about
9 the autism diagnosis, or did you learn about it
10 sometime prior?

11 A I don't remember specifically when the autism
12 diagnosis happened. We were informed in writing once
13 he was diagnosed; I just don't remember specifically
14 when it was.

15 Q All right. And is there anything in the first page
16 that you believe is not stated accurately by
17 Ms. Wink?

18 MS. LORENC: Objection to form. You can
19 answer.

20 THE WITNESS: I don't have any reason to
21 know why it's not accurate, but I don't also have
22 reason to know why it is accurate either.

23 BY MR. OLSON:

24 Q Based on what you know though, you wouldn't
25 challenge the veracity of any of her statements?

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1 A This is her statement.

2 Q Right. But you also have in your mind and
3 experience facts and knowledge, so I'm asking
4 whether you disagree with anything she said here.

5 A I have no reason to disagree with what she states.

6 Q And you were aware from this document that she was
7 home with her son two days a week?

8 A That's what she's stating here.

9 Q Okay. And you had no reason to question that;

10 true?

11 A Correct.

12 Q And you knew that was part of her FMLA application;

13 true?

14 MS. LORENC: Objection to form.

15 THE WITNESS: This isn't part of her

16 application. This is the cover sheet. The pages

17 behind it are part of the application.

18 BY MR. OLSON:

19 Q Okay. But nonetheless, Wink 15, the first page,

20 your company received it; right?

21 A Yes.

22 Q And you saw it?

23 A Yes.

24 Q And you knew that she was stating that she was home

25 with her son who had this serious health condition

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1 two days per week --

2 A That's what she stated.

3 Q -- true? And you knew that; correct?

4 A I'm stating that's what she stated. I don't have

5 direct knowledge or indirect knowledge otherwise.

6 Q All right. Her request for leave to care for her

7 son two days per week was never denied by the
8 company; true?
9 A Correct.
10 Q The second page, Bates Wink 16, it says FMLA PPWK
11 from Dr. Mance. Do you recognize that handwriting?
12 A No, I don't.
13 Q The rest of the handwriting on that page, do you
14 recognize the handwriting?
15 A No, I don't -- actually -- No, no, I don't. I assume
16 it's Tracy's handwriting on that page.
17 Q And it says here in the description due to Evan's
18 effects of PDD-NOS, he is not able to attend day
19 care.
20 You knew at the time that she filed
21 for this application that the reason she needed
22 leave was so that she could provide care for her
23 son at home instead of him going to day care; true?
24 MS. LORENC: Objection to form. You can
25 answer.

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1 THE WITNESS: This is the certification
2 form, yes.
3 BY MR. OLSON:
4 Q Okay. And you had notice specifically that she was
5 at home with her son two days per week, because he
6 could not go to day care due to a serious health

7 condition; is that accurate?

8 A That's what she is stating, yes.

9 Q Okay, you keep qualifying it that's what she's

10 stating, but you had specific notice of that; is

11 that accurate?

12 MS. LORENC: Objection to form. You can

13 answer.

14 BY MR. OLSON:

15 Q Okay, we'll start over and we'll take as much time

16 as we need to go through this. If you can answer

17 yes or no, it will make it easier. If you want to

18 qualify all your answers, you can but I'm going to

19 go back and make sure I have a clear answer, so if

20 I have to spend an hour to cover one question,

21 we're going to do that.

22 MS. LORENC: She's allowed --

23 MR. OLSON: I want to make that clear.

24 MS. LORENC: -- to answer her question --

25 MR. OLSON: Certainly.

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1 MS. LORENC: -- the questions in whatever

2 way --

3 MR. OLSON: That's fine.

4 MS. LORENC: -- she wants.

5 MR. OLSON: Well, as long as she's not

6 being cagey about it, I'd agree.

7 THE WITNESS: I'm not being cagey and I'm

8 not being unclear, and I resent that implication.

9 BY MR. OLSON:

10 Q Again, I want to ask you this question. You had
11 specific notice that Ms. Wink's reason for FMLA, at
12 least in part, was to care for her son with a
13 serious health condition two days per week at her
14 home in lieu of him going to day care; true?

15 MS. LORENC: Objection to form. You can
16 answer.

17 BY MR. OLSON:

18 Q Is that accurate?

19 A That's accurate. That's what she stated in her
20 certification.

21 Q Just say that's accurate --

22 MS. LORENC: No.

23 BY MR. OLSON:

24 Q -- and then we'll move on.

25 MS. LORENC: She's answered your

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1 question. You can't tell her how to answer it.

2 BY MR. OLSON:

3 Q The next page, Wink 17, did you receive this page
4 with the application for recertification of FMLA?

5 A We received all 16 pages.

6 Q And did you read this document when you received
7 it?
8 A No, I didn't read it when we received it.
9 Q Did you read it before you talked to Attorney
10 Lynch?
11 A Yes.
12 Q And under three where it says he's diagnosed with
13 Pervasive Development Delay, needs help constantly,
14 cannot be left alone, did Ms. Malmstadt communicate
15 that to you --
16 MS. LORENC: Objection to form. You can
17 answer.
18 BY MR. OLSON:
19 Q -- at the time that this came in?
20 A No.
21 Q But you nonetheless read it before Ms. Wink's
22 separation from employment; true?
23 A Yes.
24 Q All right. And there's no indication to you that
25 Ms. Wink's son could be left alone as of the time

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1 her employment separated; is that accurate?
2 MS. LORENC: Objection to form. You can
3 answer if you understand.
4 THE WITNESS: I don't recall

5 specifically. I didn't --

6 BY MR. OLSON:

7 Q Well, now's the time to identify it, so do you have
8 any knowledge or notice of any kind, any indication
9 whatsoever, that he could be left alone after the
10 company approved his -- or Ms. Wink's application
11 for FMLA?

12 A Not that I --

13 MS. LORENC: Same objection.

14 THE WITNESS: -- recall.

15 MS. LORENC: You can answer.

16 THE WITNESS: Not that I recall.

17 BY MR. OLSON:

18 Q Now, in five it says that he -- the son needed
19 total care to avoid injury to others and self. Did
20 you conclude that that constituted a serious health
21 condition?

22 MS. LORENC: Objection to form. You can
23 answer.

24 THE WITNESS: I didn't constitute
25 anything with this. I wasn't making a

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1 determination on this at the time it was received.

2 BY MR. OLSON:

3 Q Okay. But based on your training under the FMLA
4 and as an HR professional, is that part of your

5 analysis when you look at an FMLA claim, to at
6 least conclude in your own mind, whether you do
7 anything with the information or not, that the
8 individual who's covered has a serious health
9 condition?

10 A Yes, I didn't contest that she shouldn't have been
11 granted FMLA leave.

12 Q Okay.

13 A I was in agreement with it.

14 Q And that leave should have been granted all the way
15 through the end of her employment; true?

16 MS. LORENC: Objection to form. You can
17 answer.

18 THE WITNESS: The leave was granted
19 through the end of her employment.

20 BY MR. OLSON:

21 Q Okay. And looking at Bate stamp 19 where it says
22 we feel there is no medication or therapy at this
23 time to cure this, revaluation is required
24 regularly; did you look at that prior to --

25 A Which page are you on?

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1 Q It's Bate stamped 19. It's above the doctor's --

2 A Okay, sorry.

3 Q -- signature.

4 A Can you repeat what you said?

5 Q Sure. Where it says there -- presumably written by

6 the doctor -- we feel there is no medication or

7 therapy at this time to cure this, reevaluation is

8 required regularly, and above that it says totally

9 unpredictable and that's underlined; did you read

10 that prior to Ms. Wink's separation?

11 A Yes, and I reviewed it with our attorney.

12 Q And then Bate stamped Wink 20 is an explanation of

13 this disorder and it's circled and it says Evan.

14 Did you see that prior to Ms. Wink's separation?

15 A Yes, I reviewed it with our attorney.

16 Q So your attorney then communicated everything that

17 you needed -- and without giving me specifics --

18 communicated everything you needed to do to comply

19 with the FMLA in your treatment of Ms. Wink; is

20 that accurate?

21 MS. LORENC: I'm going to object on

22 attorney-client privilege. You can answer if it

23 would not involve giving up any privileged

24 information.

25 THE WITNESS: Can you repeat the question

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1 or read it back.

2 (Requested portion read by the reporter.)

3 THE WITNESS: Yes.

4 (Exhibit 9 marked for identification.)

5 BY MR. OLSON:

6 Q This is marked as Exhibit 9. It is a series of
7 e-mails starting March 12, 2012, ending March 19,
8 2012, between Ms. Wink and Ms. Malmstadt as well as
9 Mr. Chavez.

10 A Okay.

11 Q I see you're not covered on these. When was the
12 first time you saw these documents?

13 A When we produced them in discovery.

14 Q All right. And does this refresh your recollection
15 as to any communication that you had between anyone
16 about Ms. Wink's FMLA?

17 A Can you repeat that, I'm sorry?

18 Q Sure. Did you have conversation with anyone
19 surrounding these e-mails?

20 MS. LORENC: Objection to form.

21 BY MR. OLSON:

22 Q And when I use the term surrounding, what I'm
23 getting to is that maybe you didn't talk about the
24 e-mails specifically but did you talk about the
25 content described in the e-mails?

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1 A Yes.

2 Q So the first one, March 12 at 9:56 in the morning,

3 is from Chavez. Were you blind-copied on this by
4 the way?

5 A No.

6 Q Okay. And it says there I spoke with Peggy and
7 confirmed that your son's condition qualifies for
8 FMLA and that I can use sick time when you are out
9 of the office because of that condition. I added
10 one hour and 45 minutes of sick time to your time
11 card for last week.

12 What discussion did you have with
13 anyone on that topic?

14 MS. LORENC: Objection to form. You can
15 answer.

16 THE WITNESS: It was just a discussion
17 about if it was acceptable for her to use paid sick
18 time concurrently with her FMLA excused time off,
19 and obviously it was, so Matt just confirmed that.

20 BY MR. OLSON:

21 Q And then in Wink's response she says basically
22 thank you; I'd like to set up a quick meeting to
23 discuss how FMLA works in a situation like this; I
24 just have a few questions; I'm in the office this
25 week Wednesday through Friday from seven to three.

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1 Did you have any conversation with
2 anyone on that topic?

3 A No.

4 MS. LORENC: Objection to form. You can
5 answer.

6 THE WITNESS: No.

7 BY MR. OLSON:

8 Q And then Ms. Malmstadt responds on March 19 that
9 she did not have a chance to speak with Wink the
10 prior week but she'd be available.

11 Did you have any conversation with
12 anyone on that?

13 A No.

14 Q Did Malmstadt ever indicate to you what Ms. Wink's
15 questions or comments were about FMLA?

16 A Not that I recall.

17 Q Do you know what Malmstadt communicated to Wink as
18 to how FMLA worked in her situation?

19 A Not that I recall specifically.

20 (Exhibit 10 marked for identification.)

21 BY MR. OLSON:

22 Q Exhibit 10 is an e-mail between Malmstadt and Wink
23 dated March 20, 2012. It's Bate stamped Wink 25.
24 And this is Malmstadt's request for hours that were
25 used toward FMLA.

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1 Did you have any conversation with

2 anyone on this topic?

3 MS. LORENC: Objection to form but you
4 can answer.

5 THE WITNESS: No, I mean this isn't
6 unusual that Peggy would request an employee to
7 inform her which days that they have missed related
8 to that so that she could track it. There's a --
9 the calendar format that she tracks the dates on
10 and hours.

11 BY MR. OLSON:

12 Q Okay. And what is that calendar format?

13 A It's whatever -- I think there's either a federal
14 form or a -- I don't know if it's an MRA form, but
15 it's literally a calendar on one piece of paper, and
16 it's meant to X off on the dates that are used for
17 FMLA leave.

18 Q Okay. And does it X off hours as well?

19 A If it's not a full eight-hour day, I think she
20 indicates hours.

21 Q Has that been produced in this case?

22 A If it existed it's produced.

23 Q I haven't seen it so I'm requesting that again and
24 ask that it not be altered or destroyed or changed
25 in any way, and again, I'll keep this deposition

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1 open until I receive that document.

2 MS. LORENC: When you say you're asking
3 for it again, when did you ask for it initially?

4 MR. OLSON: I've asked for all documents
5 regarding FMLA leave by my client, and it's
6 certainly covered under numerous requests so-.

7 MS. LORENC: All right. Well, if you
8 want to identify which requests those are. I'm not
9 holding anything back, so if it's in existence
10 we'll produce it.

11 THE WITNESS: Yeah, if -- if we had it we
12 turned it in.

13 BY MR. OLSON:

14 Q Well, it's done for every employee; right?

15 MS. LORENC: Objection to form.

16 THE WITNESS: I don't --

17 BY MR. OLSON:

18 Q Is it done for every employee on FMLA?

19 A No, I don't think she uses it for every employee, no.

20 Q Every employee who takes FMLA?

21 A No.

22 Q No? Do you know why she would not have used the
23 calendar for Ms. Wink?

24 A I don't know. I mean she doesn't use it for
25 everyone. She uses it if she needs help tracking the

1 dates and hours. If she doesn't need help tracking
2 it, then she doesn't use the calendar.

3 Q Did you ever have conversation with Malmstadt about
4 the hours that Ms. Wink was using for FMLA?

5 A Just the weekly update.

6 Q Okay. And what was the feedback that you were
7 getting from Malmstadt about the hours that Wink
8 was --

9 A Nothing other than she was continuing to use time on
10 an intermittent basis.

11 (Exhibit 11 marked for identification.)

12 BY MR. OLSON:

13 Q This is Exhibit No. 11. Do you recognize this
14 document?

15 A No, I don't.

16 Q Is this the FMLA calendar you mentioned?

17 A No, it's not.

18 Q Is the FMLA calendar something that's handwritten
19 or is it typed into a computer?

20 A It's a one-page document that's a copy of a calendar;
21 literally it's the months of the calendar, and for
22 every day that someone is on medical leave an X is
23 marked over that day.

24 Q Okay. Did you look at that when you talked to
25 Attorney Lynch?

1 A I looked at whatever documents were in there. I
2 don't remember specifically seeing one or not seeing
3 one.

4 Q And this document, what is this used for if you
5 know? Are you familiar with it?

6 MS. LORENC: And I want to object for the
7 record. This document is not Bates labeled. Was
8 this produced in this litigation?

9 MR. OLSON: Well, I don't know sitting
10 here right now. I've got the same document -- I
11 will say yes -- with our mandatory responses. This
12 is a cleaner copy; that's why it's not labeled.
13 This is Wink 21 through 23.

14 MS. LORENC: Thank you.

15 BY MR. OLSON:

16 Q So you don't know where this document came from,
17 and you've not seen it before; do I understand that
18 correctly?

19 A Correct.

20 Q Okay. And you don't know whether this was supplied
21 to Ms. Malmstadt in response to her request for
22 information about FMLA time?

23 A It wasn't part of the FMLA file, so I would believe
24 it wasn't submitted to her.

25 Q Unless Malmstadt made a mistake; right?

1 MS. LORENC: Objection. You can answer
2 if you know.

3 BY MR. OLSON:

4 Q Do you find Malmstadt to be competent in her
5 position?

6 A Extremely.

7 Q Okay.

8 (Exhibit 12 marked for identification.)

9 BY MR. OLSON:

10 Q This is Exhibit 12. This is Bate stamped Wink 1
11 through 13. The date is July 5, 2012. You see at
12 the top it says Miller Compressing with a fax
13 number. Do you recognize that fax number?

14 A No.

15 Q Where it says from up above, do you recognize that
16 fax number?

17 A No.

18 Q Okay. In the header for Miller Compressing
19 Company, it shows the fax number there
20 414-671-5658. Is that the fax number or was it at
21 that time?

22 A In the header that's the -- that's the HR secure fax
23 number, but are you referring to --

24 Q And then in --

25 A I think -- you know what, I think I was looking on a

1 separate page.

2 Q Oh, okay.

3 A Yeah, on the top page, that's the HR fax number.

4 Q Okay. So this is something that according to this

5 cover sheet went from Peggy Malmstadt to Dr. Mance?

6 A Correct.

7 Q And it was dated July 5, 2012, and she's asking for

8 a 30-day recertification for Evan. What is the

9 significance of 30 days if you know?

10 A The company has the right to a medical

11 recertification from the treating physician every 30

12 days.

13 Q No matter what the condition is?

14 A I don't have an understanding that there's a

15 distinction based on condition under the FMLA.

16 Q Okay. Did Ms. Malmstadt issue this under your

17 direction?

18 A Ms. Malmstadt has the general direction from me that

19 she should seek regular recertifications from

20 treating physicians for anyone who's on FMLA leave.

21 Q So what triggered this request at this time as

22 opposed to some other time?

23 A She was probably due for recertification.

24 Q So you didn't specifically go to Ms. Malmstadt and

25 tell her to ask for recertification; is that

1 accurate?

2 A Yes.

3 Q And you don't know -- Other than it generally
4 coming up for recertification, you don't know why
5 Malmstadt did it at this time as opposed to some
6 other time?

7 A No.

8 Q Was Malmstadt asking for recertification from the
9 doctor for Evan every 30 days?

10 A I don't know. Typically what she would do is when
11 she would do recertifications, she would do them for
12 everybody who was on leave with the company and she'd
13 do them all at the same time.

14 Q Did you train Ms. Malmstadt on FMLA?

15 A No. I think I answered that previously.

16 Q Well, you said that she underwent her own training
17 through different sources?

18 A Right.

19 Q But you didn't give her any training?

20 A No.

21 Q And this first page, this is something that you saw
22 prior to Ms. Wink's separation of employment?

23 A Yes.

24 Q And the second page as well as all the way through
25 to Wink 13, you saw all of these prior to her

1 separation from employment?

2 A Yes.

3 MS. LORENC: I'd like to object to the
4 way in which this Exhibit 12 is combined together.
5 These aren't all part of the same fax, so to the
6 extent there's a representation that this all came
7 together as one fax, we would disagree with that
8 contention.

9 MR. OLSON: So the first page in the
10 receipt lines up above, it says page one of six for
11 both receipt lines. And then the second page, Wink
12 2, says page six of six for both receipt lines.
13 Wink 3 on one of the receipt lines says page four
14 of five. The other one says three of five.

15 MS. LORENC: It's also to a different
16 phone number.

17 MR. OLSON: Okay.

18 BY MR. OLSON:

19 Q Which of these pages -- You've already testified
20 that you've seen all of these pages prior to
21 Ms. Wink's separation from employment; is that
22 accurate?

23 A Yes.

24 Q Regardless of what the order was, it may have been
25 a different order, but you saw all these?

1 A Yes.

2 Q And about the time that this came in, July 5, 2012,
3 did you look at it then?

4 A I looked at it with our attorney prior to my
5 conversation with her on July 13th.

6 Q Okay. When was that conversation with the
7 attorney?

8 A I believe it was the day before.

9 Q July 12 then it would have been 2012?

10 A Yes.

11 Q But did you see this when it came in, this being
12 Exhibit 12, on or about July 5?

13 A No.

14 MS. LORENC: And I'm going to object.
15 Again, since there's multiple different dates and
16 fax numbers, I just want to make sure which
17 document you're talking about.

18 BY MR. OLSON:

19 Q Well, did you see any of these pages prior to when
20 you took them to Attorney Larry Lynch to review?

21 MS. LORENC: Objection to form but you
22 can answer.

23 THE WITNESS: No.

24 BY MR. OLSON:

25 Q Did you sit down with Larry Lynch and talk about

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1 these face to face or over the phone, or what was
2 that -- or do it by e-mail; how did that work?

3 MS. LORENC: And again, I'll object as to
4 attorney-client privilege. You can answer so long
5 as it doesn't involve privileged communications.

6 THE WITNESS: We had talked over the
7 phone, face to face, and over e-mail, not just
8 about this but about several ongoing topics at the
9 time.

10 BY MR. OLSON:

11 Q Okay. So with respect to Ms. Wink, did you talk to
12 Attorney Lynch by phone and in person?

13 A Yes.

14 Q Did you review the documents with him in person?

15 MS. LORENC: I'm going to instruct you
16 not to answer that.

17 MR. OLSON: I'm asking whether the
18 documents were reviewed with him in person, not the
19 substance of the communication.

20 MS. LORENC: Well, you're making the
21 assumption that the documents were reviewed with
22 him, and if she answers that then she's telling you
23 that they reviewed the documents. So you've asked
24 if they met in person --

25 MR. OLSON: Review of documents doesn't

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1 go to the substance of the communication. So
2 again, if you're instructing her not to answer,
3 then we can take it up with the judge, but that's
4 not a proper assertion of attorney-client.

5 MS. LORENC: I'm instructing her not to
6 answer.

7 BY MR. OLSON:

8 Q Okay. In paragraph number three at Wink 3 --
9 please take a look at that. Did you prior to
10 Ms. Wink's separation read where it states has had
11 difficulty staying in day care, challenging care
12 daily, and the rest of it I can't read; did you
13 read that?

14 A Yes.

15 Q Now, on page Wink 7 where it says administration
16 received by Peggy Malmstadt, February 29, 2012,
17 that is acknowledging her receipt. That's not
18 actually an approval of the FMLA leave, is it?

19 A Correct, that's approval -- or, I'm sorry, correct,
20 that's receipt, not approval.

21 Q And in looking through this exhibit or the prior
22 exhibit, anywhere in there do you see what you
23 believe to be an approval of the request for FMLA

24 or the recertification of FMLA?

25 A No, I don't.

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1 Q And I'm not sure if it was clear from your prior
2 answer, but do you know of -- sitting here today of
3 any specific written authorization from the company
4 approving -- Let me ask it a different way. Strike
5 that last question.

6 Sitting here today are you aware of
7 any written approval of the FMLA application by
8 Ms. Wink?

9 A I don't know specifically if -- if there was an
10 approval, it would be part of the file that was
11 provided. Typically if there was an approval, it
12 would be on the federal form that -- and I forget
13 what the form is called, but I think it's like a
14 two-page form and it says your request for a leave
15 has been approved or has been denied, and you check
16 the box, and then you -- it would have been mailed
17 out to Tracy at her home address. I don't know if a
18 copy of those is kept in the file or not.

19 MS. LORENC: Can I ask a question off the
20 record?

21 (Discussion held off the record.)

22 BY MR. OLSON:

23 Q Did you ever document your conversations with

24 Ms. Wink about her talking about her son too much
25 at work?

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1 A No.

2 Q Did you ever document her using the phone too much
3 at work to talk to his health care providers?

4 A I think that was part of the outline discussion with
5 her on July 13th.

6 Q Part of that outline was that she was talking to
7 her son's doctors too much on the phone?

8 A Part of the outline was that she was using the
9 company phone and her personal phone during working
10 time, and we wanted that to only be done on breaks
11 and lunches.

12 Q Even if it was to talk to his health care
13 providers; true?

14 A True.

15 Q What is OPT?

16 A Order Processing Team.

17 Q Did you have communication with Ms. Wink that she
18 could not use other members of the Order Processing
19 Team as backup for herself?

20 MS. LORENC: Objection to form. You can
21 answer.

22 THE WITNESS: Matt Chavez had that

23 conversation with her.

24 BY MR. OLSON:

25 Q In your presence?

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1 A Yes.

2 Q During what conversation?

3 A The July 13th conversation.

4 Q What did he say to her?

5 A He -- he had explained to me prior to that that she
6 had been --

7 MS. LORENC: Just answer the question.

8 He just stated that she had been using members of
9 the department to assist her in completing her work
10 without his authorization, and that she needed to
11 get his authorization for taking team members off
12 of what their assigned duties were.

13 BY MR. OLSON:

14 Q And how did that reconcile with her deciding what
15 work should be prioritized?

16 A I don't understand the question.

17 Q Was she expected that not only could she not use
18 others to assist her on tasks, but she also once
19 she decided what would be a top priority in her
20 tasks, she should only do it herself and not use
21 other people on the team?

22 A That's correct.

23 Q And was she allowed to talk to Chavez about using
24 other people on the team if she got his permission
25 first?

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1 A Yes.

2 Q Okay. And would that be part of prioritizing, if
3 she went to him and asked about using other people
4 on the team to get prior -- a high priority task
5 completed?

6 A No, the prioritizing issue with her was her ability
7 to determine what order her work needed to be
8 completed in.

9 Q Well, the completion of the work would sometimes
10 require her to seek the assistance of other team
11 members; true?

12 A No, her work and the work of everyone in that
13 department is evenly divided.

14 Q Okay. What's the significance of the term team if
15 they're all doing only their own tasks and it's all
16 evenly divided?

17 A It's the manager's responsibility to distribute the
18 work. It's not the responsibility of coworkers to
19 assign work to other coworkers.

20 Q Okay. So if he's assigning the work, then is he
21 not identifying the priority of the work? He being

22 Chavez.

23 A I guess I don't understand what you're asking.

24 Q When Chavez was giving the work evenly to each
25 person in his department, the Order Processing

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1 Team, was he also communicating the priority of the
2 work?

3 MS. LORENC: I'll object. If you know
4 you can answer, but I'm objecting to form.

5 THE WITNESS: I mean each of the members
6 knew what the priorities of each of their own jobs
7 were. If they needed assistance in completing it,
8 it was his discretion who would complete that work.

9 BY MR. OLSON:

10 Q So he would not communicate to them what the
11 priorities of their work was. He would give them
12 the work, and they had to determine on their own
13 what the priority would be?

14 A Correct, once they were trained.

15 Q And so establishing the priority would be up to
16 Ms. Wink, and if something she determined was a
17 high priority she could not use someone else unless
18 she asked; is that accurate?

19 A Yes.

20 Q Was she using the backup of other employees
21 excessively?

22 A Yes, she --

23 MS. LORENC: Objection to form. You can
24 answer.

25 THE WITNESS: Yes, she was.

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1 BY MR. OLSON:

2 Q Okay. And was that something that she had been
3 talked to about previously?

4 A She had not been talked to previously about that.

5 Q Okay. Did you tell Ms. Wink that the FMLA only
6 covered appointments and therapy sessions?

7 MS. LORENC: Objection to form. You can
8 answer.

9 THE WITNESS: No, I told her that the
10 company would honor her FMLA to cover her absences
11 for doctor appointments and therapy visits, and
12 that we would follow the FMLA to the letter of the
13 law.

14 BY MR. OLSON:

15 Q Well, you told her though that FMLA didn't apply to
16 her staying home with her son; right?

17 A No, I didn't tell her that.

18 Q Was that your opinion?

19 A No, that's not my opinion.

20 Q Was there anything she said about her son at work

21 that was distasteful or improper, or was it just
22 the amount of time or number of times that she
23 talked about her son's condition that was a
24 problem?
25 A It was the quantity and duration of the conversations

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1 that were excessive and were distracting both herself
2 from her work and others from completing their work.

3 Q But not the content?

4 A I don't know what the content of her conversations
5 with other people were.

6 Q Nonetheless, you wanted her to continue working
7 there; is that right?

8 A Yes.

9 Q What did you tell Ms. Wink if anything as to why
10 she needed to be in the office five days a week?

11 MS. LORENC: Objection to form but you
12 can answer.

13 THE WITNESS: Because that's the regular
14 work schedule, because the department is -- there
15 are two primary functions of the department: It's
16 to support the Marketing Administration Team and
17 it's to support customers who call in and have
18 inquiries about their transactions, and those times
19 most frequently that those questions or inquiries
20 come in are Monday through Friday, eight to four.

21 BY MR. OLSON:

22 Q Okay. So you understood that by requiring her to
23 be in the office five days a week, her FMLA would
24 no longer be granted with respect to her being home
25 with her son two days per week; correct?

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1 A We never told her that her FMLA wouldn't continue to
2 be granted. I specifically told her it would
3 continue to be granted to the letter of the FMLA law.

4 Q But not for the purposes of her being home with her
5 son two days per week; you made that clear to her,
6 didn't you?

7 A No, what I made clear to her is that she wouldn't be
8 allowed to continue telecommuting. She would have
9 been able to use FMLA time for those days, but we
10 weren't going to continue the telecommuting. And her
11 work schedule would have to be eight to four, not
12 seven to three.

13 Q All right. So she could be home then to care for
14 her son two days per week after July 13; true?

15 A She could have, sure --

16 Q Okay. And --

17 A -- as long as she had FMLA time left, yes.

18 Q Okay. So you told her she could stay home with her
19 son two days per week; right?

20 A I didn't communicate anything about the two days a
21 week. I said your work schedule is going to be
22 Monday through Friday, eight to four; we'll continue
23 to certify your FMLA leave time for doctor
24 appointments, therapy, whatever, and we'll adhere to
25 the letter of the law for your FMLA.

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1 Q Okay. So you mentioned therapy sessions, doctor
2 appointments, but you didn't mention anything about
3 her being home with her son two days per week; is
4 that correct?
5 A Yes.
6 Q What I said is correct?
7 A I did not talk to her about two days a week anything.
8 Q Wasn't that the biggest obstacle in your mind, that
9 she was out of the office two days per week?
10 A No.
11 Q Wasn't that the biggest concern you had?
12 A No.
13 Q Okay. What was the biggest concern you had about
14 Ms. Wink making a commitment to the company going
15 forward as of July 13?
16 A The biggest commitment issues were the eight to four
17 instead of seven to three because that's when the
18 coverage was needed. The telecommuting was not
19 working for us because there was a number of mistakes

20 that were happening in her work and her manager
21 wanted to more directly oversee and review the work;
22 he was approving the time that she was working, so he
23 wanted to directly oversee that. There were mistakes
24 that were happening in her work that we wanted
25 cleaned up.

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1 Q So the first priority was, what, to have her there
2 and accountable to her boss in the office where she
3 wasn't distracted?

4 A Absolutely.

5 Q Okay.

6 MR. OLSON: Okay. Well, it's noon now.
7 We can take a break and reconvene whenever it's
8 convenient for you.

9 (Recess taken from 11:59 a.m. until 12:58
10 p.m.)

11 MS. LORENC: I was able to confirm with
12 my office that we sent the privilege log to you on
13 August 28th along with the rest of the production.

14 MR. OLSON: Was that by e-mail? I didn't
15 see it in the hard copies anywhere.

16 MS. LORENC: I can confirm that as well.
17 However we sent the other stuff to you is how it
18 was sent.

19 (Exhibit 13 marked for identification.)

20 BY MR. OLSON:

21 Q This is Exhibit 13, Defendant's Objections to
22 Interrogatories. It is a seven-page document. Is
23 this the record you had identified in the morning
24 session that you reviewed in preparation for your
25 deposition today?

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1 A No. I reviewed the responses to the interrogatories,
2 not the objections.

3 Q I don't show -- Well, let me ask you this: Did you
4 sign a version of this document?

5 A Did I? I don't believe I did.

6 Q Okay. And take a look at this document. Are you
7 saying there's another version that has additional
8 answers to it?

9 A Can I check what the version is I looked at? I don't
10 remember --

11 Q Sure.

12 A I don't remember what the title of it was.

13 Q Sure.

14 MS. LORENC: And for the record, you're
15 looking at Defendant's Objections to
16 Interrogatories. We provided Defendant's Answers
17 to Interrogatories as well. As you may recall, we
18 needed a short extension to provide the answers,

19 but under the federal rules I didn't want the
20 objections to be waived so we produced objections
21 and then separately produced answers.

22 BY MR. OLSON:

23 Q Okay. Do you mind showing me the one that you
24 referred to?

25 MS. LORENC: Assuming they don't have any

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1 of my --

2 MR. OLSON: Yeah, if they don't have
3 notes on them.

4 THE WITNESS: The answers.

5 MS. LORENC: Be careful, there's a piece
6 of paper behind it.

7 MR. OLSON: Thank you. Can we make a
8 copy of this and mark it?

9 MS. LORENC: Do you not have our answers
10 to interrogatories?

11 MR. OLSON: Can we not make a -- can we
12 not mark this?

13 MS. LORENC: Well, we can do this off the
14 record. I'm just concerned --

15 THE WITNESS: Can I look at that first to
16 see if I wrote anything on there?

17 THE REPORTER: Am I off the record?

18 MS. LORENC: Well, maybe not.

19 MR. OLSON: Go ahead and check it. I
20 didn't see anything handwritten on it. We'll
21 probably use this one.

22 THE WITNESS: Okay. But, yeah, I would
23 like that copy back.

24 MR. OLSON: Okay.

25 (Discussion held off the record.)

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1 (Exhibit 14 marked for identification.)

2 BY MR. OLSON:

3 Q Exhibit 13, did you see this document before it
4 went out?

5 A I received a copy of it when it did go out. I didn't
6 review it before it went out.

7 (Exhibit 15 marked for identification.)

8 BY MR. OLSON:

9 Q Exhibit 15 is Bate stamped 594 through 614. These
10 appear to be payroll records for Ms. Wink. Have
11 you seen these documents before?

12 A Yes.

13 Q Did you participate in the preparation of these
14 documents?

15 A By preparation do you mean the processing of the
16 paychecks?

17 Q Printing them out -- I mean the actual exhibit

18 documents.

19 A Yes, I requested a copy from our payroll department.

20 Q Okay. And normally do the payroll records reflect

21 if an employee has taken FMLA time?

22 A No, they do not.

23 Q Why do they not?

24 A Because this is her check stub, and the attendance

25 records reflect FMLA time. This is just what she was

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1 paid and the codes.

2 Q Right, but isn't it possible to code FMLA time

3 within the pay record?

4 MS. LORENC: Objection to form. If you

5 know you can answer.

6 THE WITNESS: I wasn't responsible for

7 payroll. That's just not how our payroll system

8 was set up for the check stubs.

9 BY MR. OLSON:

10 Q If there's a substitution of pay for FMLA time,

11 would that show up in the check stub?

12 A The -- Whatever the paid balance was. So if it was

13 sick time, vacation, that would show up on the check

14 stub.

15 Q But not that it was pay covering FMLA time?

16 A Correct.

17 Q Is it accurate that the employee is not provided
18 with the designation of the FMLA time?
19 A Are you referring to the federal designation form?
20 Q Let me back up half a step. What is the document
21 you said is -- keeps track of within the company
22 the time taken during each pay period by the
23 employee that is designated as FMLA time?
24 A Her attendance records would show that, and then that
25 should be kept in the FMLA file.

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1 Q And you mentioned before the midday break an FMLA
2 calendar. Is that the document you're talking
3 about now or is it something else?
4 A There's two records. There is the attendance record
5 which is every time an employee punches in or out the
6 time stamp -- any time like a supervisor codes
7 something as sick time, vacation, FMLA, that would be
8 in her attendance record. And then the FMLA calendar
9 that you're referring to is a different document.
10 Q And what's the title on the attendance record? Is
11 that what it's called?
12 A I think it would say Kronos on it.
13 Q And that comes out of the Kronos software --
14 A Yes.
15 Q -- program? And we've not seen such a document
16 today in the exhibits, have we?

17 A I don't recall specifically what was -- I mean I
18 believe it was provided.

19 MS. LORENC: You can look back through
20 the exhibits if you want to.

21 THE WITNESS: Yeah, not in anything we've
22 reviewed today.

23 BY MR. OLSON:

24 Q Not anything today?

25 A Yeah.

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1 Q But you believe that it was produced as part of the
2 case, a list of the time taken by Ms. Wink that was
3 designated as FMLA in the Kronos system?

4 A I believe her time records were submitted, so any of
5 like her punches in and out and absences from work.

6 Q How was her time recorded for the days that she was
7 at home with her son?

8 A I don't remember specifically. I mean I wasn't the
9 one approving those days. It just -- she wouldn't
10 have any punches in or out, and then it would be
11 coded in the system as an excused absence.

12 Q And once it's coded as an excused absence, who
13 designates it specifically as FMLA or not FMLA
14 time?

15 A One of three or four people: Either the payroll

16 coordinator would designate it if she knew that the
17 person was off on FMLA time. The direct supervisor
18 could do it. The next-level manager could do it. An
19 HR member could do that.

20 Q Who made the final decision to terminate Ms. Wink?

21 A No one. The company didn't decide to terminate her.

22 Q Who made the decision to present her with the
23 ultimatum that she had to commit to being at work
24 five days a week or she could not continue her
25 employment?

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1 A She wasn't given an ultimatum of being there five
2 days a week. She was told that her work schedule was
3 changing and what it was changing to.

4 Q Let's not go through all of them. Let's focus on
5 that one first.

6 A Okay.

7 Q Her work schedule was changing to five days per
8 week; is that correct?

9 A Correct, her schedule is Monday through Friday.

10 Q She had to be in the office five days a week from
11 eight to four; correct?

12 A That was her schedule, correct.

13 Q All right. Who made that decision, you or someone
14 else?

15 A Myself, her direct supervisor, her next-level

16 manager, and the president of the company.

17 Q Who was the next-level manager at that time?

18 A Margo Eshleman.

19 Q Is she with the company now?

20 A No, she's not.

21 Q Was she laid off?

22 A Yes, she was.

23 (Exhibit 16 marked for identification.)

24 BY MR. OLSON:

25 Q Exhibit 16 is Bate stamped D592 and 591. Are you

130

1 familiar with this document?

2 A Yes.

3 Q Is this a document you created?

4 A First of all, let me just say that there are -- these

5 are two -- two separate spreadsheets.

6 Q Okay.

7 A I did not create the first page. I did create the

8 second page.

9 Q Who created the first one if you know?

10 A Matt Chavez and Margo Eshleman.

11 Q And did he do that at your direction?

12 A Yes, he did.

13 MS. LORENC: And just so the record is

14 clear when you say the first one, you're referring

15 to 592; right?

16 THE WITNESS: Yes.

17 BY MR. OLSON:

18 Q Did you review 592 with Mr. Chavez?

19 A Yes, I did.

20 Q And was there anything in here with which you
21 disagreed?

22 A No.

23 Q The original one I assume was color coded?

24 A It was just highlighted. They were all the same
25 colors. I don't know what the highlighting was

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1 supposed to designate.

2 Q Okay. Tracy Wink was highlighted. What was the
3 significance of that?

4 A I have no idea.

5 Q 1.0, what does that refer to?

6 A I believe it's full-time equivalency.

7 Q Is full-time equivalency 40 hours per week?

8 A Yes.

9 Q And up until that point she had been working about
10 30 hours a week; is that right?

11 A Pardon?

12 Q As of July 12 she had been working about 30 hours a
13 week?

14 A Correct.

15 Q So did this show what the expectation of Ms. Wink
16 would be going forward? Why does it say one in
17 other words if she's only working 30 hours a week?

18 MS. LORENC: Objection --

19 THE WITNESS: I don't know. I didn't
20 create this.

21 BY MR. OLSON:

22 Q And you didn't talk to him about that?

23 A Not about the -- not about the one or the point five.

24 Q Was Gail Briglevic a part-time employee?

25 A No, she was a full-time employee but she was working

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1 part of her time at the scales.

2 Q So she was part-time in scales?

3 A Correct.

4 Q And part-time somewhere else?

5 A Correct.

6 Q Alexandra Harris, was she part-time?

7 A She was a part-time employee.

8 Q The next column, scale payables, what does that
9 refer to? Is that a department?

10 A It's a specific function within the department.

11 Q And then order processing, is that all done at the
12 one location?

13 A Yes --

14 MS. LORENC: Objection to form.

15 THE WITNESS: Yes, it is.

16 BY MR. OLSON:

17 Q Now, over in the right column you see at the top it
18 says Greenwood Scale. Is that a different
19 location?

20 A Yes, that's a different location.

21 Q There's an X there for a few of the employees under
22 order processing. Does that indicate they were
23 doing order processing for that location or at that
24 location or something else?

25 A There's a key at the top -- the right-hand top

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1 column, and the X indicates that they were current or
2 primary backup and they were covered in that
3 functional area.

4 Q Okay. As opposed to having parens around the X
5 where that was their primary job responsibility?

6 A Correct.

7 Q So would you agree that this chart reflects that
8 Wink was responsible to be working 40 hours a week
9 doing sales brokerage order processing?

10 MS. LORENC: Objection to form.

11 THE WITNESS: That was what her primary
12 function was.

13 BY MR. OLSON:

14 Q And you don't know why some of the employees have a
15 designation for a one or a point five and others do
16 not?
17 A No, I'm not certain.
18 Q What does this chart reflect with respect to any
19 change for Ms. Wink?
20 A I don't recall.
21 Q And looking at it now you can't tell?
22 A No.
23 Q In C where it says Matthew, that's Matt Chavez, is
24 that correct, in the lower left corner?
25 A Yes.

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1 Q And it says Matthew to retrain at all desks. Do
2 you know what that refers to? Does that mean he'll
3 retrain people at all desks or he himself will
4 retrain at all desks?
5 A He himself will refresh at all desks.
6 Q And the second page of Exhibit 16 marked D591, did
7 you use information from the first page of this
8 exhibit to create 591?
9 A Yes, I did.
10 Q And what was the purpose of this document?
11 A It was my listing to reflect who had previously been
12 in the department and who would be in the future

13 departments.

14 Q And with respect to order processing, it says Wink
15 quit. Was she already in that column --

16 MS. LORENC: Objection to form.

17 BY MR. OLSON:

18 Q -- prior to you indicating that she had quit?

19 A No, no.

20 Q Did you create this document before the 18th?

21 A No.

22 Q Were there other drafts or versions of this
23 document?

24 A There was a previous draft a week or so previous to
25 this, and it showed that the two selections were Kim

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1 Noonan and Roseanne Endvick only.

2 Q And that prior version then, that resulted in
3 Noonan being put off for a month -- strike that.

4 As a result of Wink no longer being
5 employed by the company, that resulted in Noonan's
6 layoff being put off a month; is that accurate?

7 A No, I believe Kim worked longer than one month
8 following the July layoffs, but her --

9 Q Was that -- Go ahead.

10 A -- her quit -- her quit did result in one of the
11 members of the department's not being laid off.

12 Q Who was that?

13 A Kim Noonan.

14 Q When you say her you mean Tracy Wink?

15 A Correct.

16 Q And the future department, that would indicate what

17 the department would look like after the layoff or

18 layoffs?

19 A Yes.

20 Q And where it says Kasprzyk OP August, does that

21 mean she'd be laid off in August or something else?

22 A It means either she would be laid off in August, or

23 that she would be reassigned to the department in

24 August.

25 Q Did you explore whether Wink could be reassigned to

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1 a different department in contrast to having a

2 requirement that she not work from home twice a

3 week?

4 A Yes, we did.

5 Q Did you document that somewhere?

6 A That was documented with the first page.

7 Q And how was it documented? Are you saying there's

8 a document somewhere that was combined with this

9 page?

10 A No.

11 Q Okay.

12 A This first page is to document all of the areas that
13 she had been trained in.

14 Q Oh, I see. So was there somewhere she could have
15 worked and still been at home twice a day -- twice
16 a week rather?

17 A No.

18 Q What was Alexandra Harris's job? She worked in
19 orders?

20 MS. LORENC: Objection to form but you
21 can answer it.

22 THE WITNESS: What did you say?

23 BY MR. OLSON:

24 Q According to this chart Alexandra Harris worked in
25 orders?

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1 A Not that she worked there. She was -- knew how to
2 perform that job.

3 Q Okay.

4 A It's not her current assignment.

5 Q Okay. Is she still with the company?

6 A No, she's no longer with the company.

7 Q When did she cease being with the company?

8 A I believe she was laid off at the end of August 2012.

9 Q She continued part-time up until her layoff?

10 A Yes.

11 Q Did someone replace her?

12 A No.

13 Q You had mentioned that Gail Briglevic was assigned

14 to two different departments. What was the --

15 Aside from being in scales, where else was she

16 working?

17 A She was working at a joint venture called Seven

18 Stars.

19 Q Okay. What is Seven Stars?

20 A That's an auto salvage company.

21 Q Okay.

22 A It was a joint venture.

23 Q Is she still with the company?

24 A No, she's not.

25 Q When did she leave?

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1 A July 23rd, 2012.

2 Q So on page one of Exhibit 16 marked 592, what areas

3 could Ms. Wink work in according to this document?

4 All the areas that are checked or was there

5 something else?

6 A She was trained to work in all the areas that were

7 checked.

8 Q Now, she had testified as I recall that there was

9 only one desk that she was not complete in

10 training, nonferrous payables. Is that your

11 recollection as well?

12 A Yes.

13 Q What is carload? Is that part of the order
14 processing function?

15 A No, it's not. It's a transportation function.

16 Q Okay. But nonetheless, Sarah Reese was doing that
17 and she is listed under order processing. Do you
18 know why she would be on order processing but
19 performing carload?

20 MS. LORENC: Objection. I don't think
21 that's lining up correctly, is it? I withdraw my
22 objection, I apologize.

23 THE WITNESS: Because it's not a
24 full-time position by itself.
25

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1 BY MR. OLSON:

2 Q Okay. Where else was she working?

3 A She also worked for order processing and in
4 transportation.

5 Q Okay. But she's not under transportation, is she?

6 A Everyone on the spreadsheet is just listed once.

7 Q But her primary duty is listed as carload under
8 order processing. Do you agree with that?

9 A It's also listed as a primary function of scale
10 payables, which was an order processing function.

11 Q Okay. So she was split between those two
12 departments?

13 A Correct.

14 Q And could Wink do carload?

15 A No.

16 (Exhibit 17 marked for identification.)

17 BY MR. OLSON:

18 Q Exhibit 17 is marked D578. It's a Miller
19 Compressing Company QES Meeting Record regarding
20 training nondiscrimination. This was according to
21 this presented by you. This is the training you
22 had mentioned earlier; is that correct?

23 A This was the formal training, but I had mentioned
24 that it was part of a discussion prior to the 16th as
25 well.

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1 Q And is this a form that you had used previously, or
2 was it generated for the first time in regard to
3 this RIF?

4 A Is this form a form that I've used previously --

5 Q Right.

6 A -- or the specific --

7 Q This template, this blank -- as a blank template
8 had you used it previously?

9 A Yes, this is the company's normal meeting record for

10 formal training.

11 Q All right. Keep those together.

12 MS. LORENC: Are you done with 17?

13 MR. OLSON: Yes.

14 THE WITNESS: Is this my copy back?

15 MS. COVINGTON: Oh, but that has the --

16 that's the original copy that she gave you.

17 THE WITNESS: I just need my copy back.

18 MS. LORENC: I can give this to you.

19 THE WITNESS: Okay.

20 BY MR. OLSON:

21 Q All right. So Exhibit 14, this is the document you

22 identified as one of the records that you reviewed

23 in preparation for your deposition today; is that

24 correct?

25 A Yes.

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1 Q And did you ever sign a version of this document?

2 A I don't recall if I did or not.

3 Q In reading through this -- You looked at it this

4 morning; is that right?

5 A Yes.

6 Q Was there anything in here that you saw with which

7 you disagreed?

8 A No.

9 Q Is there anything in response that you believe is

10 missing from a complete answer?

11 MS. LORENC: You can review it if you
12 want.

13 THE WITNESS: Could you read that back,
14 please.

15 (Requested portion read by the reporter.)

16 THE WITNESS: No.

17 BY MR. OLSON:

18 Q Take a look at the top of page two, please. In
19 response to Interrogatory No. 1, it states in the
20 last sentence of that answer, on Monday, July 16,
21 2012, Plaintiff reported to Ms. Barbian that she
22 could not switch her hours to eight to four p.m.
23 because of day care issues and that she quit.

24 Is that accurate, that she did tell
25 you that she could not switch her hours because of

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1 day care?

2 A Yes.

3 Q And did Peggy Malmstadt have the authority to grant
4 an employee FMLA leave on her own, or did she need
5 to get additional approval from someone else within
6 the company?

7 MS. LORENC: Objection to form.

8 THE WITNESS: She had the authority to

9 approve it on her own.

10 BY MR. OLSON:

11 Q And did she do that for Ms. Wink each time, or did

12 someone else tell Ms. Malmstadt that it was okay to

13 grant the FMLA?

14 MS. LORENC: Objection to form.

15 THE WITNESS: She -- she did it for

16 Ms. Wink each time.

17 BY MR. OLSON:

18 Q And Ms. Malmstadt did it on her own each time

19 without approval from you or from someone else; is

20 that correct?

21 MS. LORENC: Same objection.

22 THE WITNESS: Correct.

23 BY MR. OLSON:

24 Q Jeff Granger, what were his flexible hours?

25 A He would work eight to two, sometimes 1:30.

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1 Q When were his flexible hours revoked?

2 A The week before the reductions, July 23rd, 2012.

3 Q Did he continue in the company's employ?

4 A Yes, he did.

5 Q Until when?

6 A End of February 2014.

7 Q Was he laid off?

8 A Yes, he was.

9 Q What were Margo Eshleman's hours, flex hours?

10 A Seven to 11 or seven until noon, and she also worked

11 from home after that.

12 Q Did she work from home due to FMLA reasons?

13 A No.

14 Q What were her hours changed to?

15 A Seven to four.

16 Q And she was no longer allowed to work from home?

17 A Correct.

18 Q And did that happen in July of 2012?

19 A It happened the week before the July 2012 reductions.

20 Q Lonnie Greene, what was her flex time?

21 A She had varying hours on the night shift. I'm sorry.

22 She had varying hours on the day shift.

23 Q How was that changed then?

24 A She was -- We eliminated the first shift position and

25 she began working second shift hours.

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1 Q Okay. So is it accurate to state that in answer to

2 Interrogatory No. 11, none of those three

3 individuals who had their flex time revoked were

4 using flex time for FMLA purposes?

5 A At that time, correct.

6 Q Okay. And in answer to No. 13, it says that Sarah

7 Barbian, Matthew Chavez, and John Busby were given

8 the directive to terminate two people from
9 Plaintiff's department. Who gave that directive?
10 A John Busby and Susan Miller.
11 Q Well, it says John Busby was given the directive;
12 so he gave a directive to himself?
13 MS. LORENC: Objection.
14 THE WITNESS: Susan Miller the owner of
15 the company gave the directive to him.
16 BY MR. OLSON:
17 Q Okay. Is she still involved with the company?
18 A No, she's part of the former management group.
19 Q So she's not involved with the company in any way
20 anymore; is that right?
21 A Correct.
22 Q When did she last have involvement with the
23 company?
24 A September 27th, 2012.
25 Q And were you present when Susan Miller directed

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1 John Busby to terminate two people from the order
2 processing department?
3 A No, I wasn't. That was at a board meeting.
4 Q When was that board meeting?
5 A I don't know the exact date. It was sometime towards
6 the end of June 2012.
7 Q Have you ever reviewed minutes from board meetings?

8 A No.

9 Q Are minutes taken during the board meetings?

10 A Yes.

11 Q And that was concerning the reduction in force that
12 was in effect as of July of 2012 that Miller gave
13 that directive to Busby; is that correct?

14 MS. LORENC: Objection to form. You can
15 answer it if you understand it.

16 BY MR. OLSON:

17 Q Do you understand the question? It's probably not
18 very well worded. Was it during a board meeting
19 that Miller in June of 2012 directed Busby to cut
20 two people out of the order processing department?

21 MS. LORENC: Objection. She already
22 testified she wasn't at the board meeting, but you
23 can answer it if you know.

24 THE WITNESS: The direction that was
25 given to Busby from the board of directors

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1 including Susan Miller was to make cuts across the
2 board. Order processing was one of all departments
3 who were affected.

4 BY MR. OLSON:

5 Q And specifically two people from order processing;
6 right?

7 A Busby made the decision for two people.

8 MR. OLSON: Okay. Counsel, I renew my
9 request for documents regarding the reduction in
10 force including the board minutes from June of 2012
11 during which that topic was discussed and any other
12 board meeting minutes.

13 MS. LORENC: Well, I don't believe you've
14 made a request for board meeting minutes --

15 MR. OLSON: Well, go back and read my
16 requests.

17 MS. LORENC: If you want to direct me to
18 a specific request --

19 MR. OLSON: You've got them. You've had
20 them for several months.

21 MS. LORENC: Yes.

22 MR. OLSON: Read them. If you can't find
23 it, let me know but I guarantee it's in there.

24 MS. LORENC: Well, you've made
25 misrepresentations about what I have and haven't

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1 done today including producing the privilege log,
2 so -- but we have not withheld anything, so if we
3 have them -- and she's already testified she wasn't
4 at the board meeting so she doesn't know if there
5 were any minutes taken that day, but if there were
6 we will produce them subject to privilege.

7 (Discussion held off the record.)

8 BY MR. OLSON:

9 Q Is it accurate that no one with management
10 authority told Ms. Wink that she could not discuss
11 her son with her coworkers?

12 A Yes, that's accurate.

13 Q So you never mentioned to her that she was talking
14 about her son too much at work?

15 A No, I told her she was having excessive personal
16 conversations that needed to cease.

17 Q And those were primarily about her son, were they
18 not?

19 A I've already answered several times that I don't know
20 what her personal conversations were about.

21 Q From where did you get the information?

22 MS. LORENC: Objection to form.

23 THE WITNESS: I think I've already
24 answered that also. Phil Heston, Mary Krecak, John
25 Busby, Joe Kovacich, Jackie Smith, Matt Chavez,

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1 Margo Eshleman --

2 BY MR. OLSON:

3 Q None of --

4 A -- Tom Carek.

5 Q None of them told you that she was talking about

6 her son too much at work; right?

7 A They didn't say her son. They said there was an

8 excessive amount of chitchat happening.

9 Q Okay. So then why was it that she was not allowed

10 to talk to her son's doctor's office unless she was

11 on a break if that was not an issue?

12 A Because that was an exception, to make personal calls

13 during work time, because she was making mistakes in

14 her work and it was clear that she was distracted,

15 and we wanted her focused on her work.

16 Q Okay. So you were aware that she was making calls

17 to her son's doctor from work; is that correct?

18 A Yes, she requested an exception from the policy --

19 Q Okay.

20 A -- for that.

21 MS. LORENC: Please let her finish her

22 question before you cut her off -- her answer,

23 excuse me.

24 MR. OLSON: Oh, sure, by all means.

25 BY MR. OLSON:

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1 Q Did you consult with anyone other than the

2 attorneys to provide answers to Exhibit No. 14?

3 A You said to Exhibit No. 14?

4 Q Right.

5 A I discussed with Peggy Malmstadt, Matt Chavez. I

6 think that was it.

7 Q For which ones did Chavez provide information, for
8 which responses?

9 A He provided the reduction analysis, Exhibit 16.

10 MS. LORENC: He's asking just about the
11 answers to No. 14.

12 THE WITNESS: Oh.

13 BY MR. OLSON:

14 Q Yeah, the interrogatory responses.

15 A Okay. He provided information regarding number one,
16 number two --

17 MS. LORENC: He wants to know if you
18 spoke to Matt when giving answers to this --

19 THE WITNESS: Oh.

20 MS. LORENC: -- to Exhibit 14.

21 THE WITNESS: No, no.

22 BY MR. OLSON:

23 Q Did Matt provide information to you to assist you
24 in answering one and four -- what were the numbers
25 you said?

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1 A I said numbers one and two.

2 Q One and two. Did he provide you with information
3 to assist you in answering those?

4 A No, I mean I was confirming what I already knew to be

5 true with him.

6 Q Did you take notes during your conversations with

7 him --

8 A No.

9 Q -- in answering these? Okay. What other ones did

10 Mr. Chavez provide information in assisting you to

11 answer these?

12 A I guess I'm having a difficult time answering that

13 because of the way that the questions are listed in

14 here.

15 MS. LORENC: Do you understand what his

16 question is?

17 BY MR. OLSON:

18 Q Did you go to --

19 THE WITNESS: I mean he wants me to list

20 every single question that Matt provided

21 information --

22 BY MR. OLSON:

23 Q Right.

24 A -- to this response.

25 Q Right.

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1 MS. LORENC: At the time that we were

2 responding to these.

3 THE WITNESS: Right. At that time it was

4 none.

5 BY MR. OLSON:

6 Q Oh. So Chavez didn't give you any information.

7 What about his boss, did she give you any

8 information?

9 A I have not had any discussions with her about this.

10 Q Okay. What about Ms. Malmstadt?

11 A She provided the FMLA documentation that we provided.

12 Q What about in response to the interrogatories, did

13 you go to her to confirm any of the information

14 that you provided in the answers?

15 A No, because that was the only information I didn't

16 have was the FMLA information, the requests and

17 approvals.

18 Q So in answering questions about the FMLA, you did

19 not go to Malmstadt for information; is that

20 accurate?

21 A No, that's what I did ask her for information that

22 was relating to her FMLA.

23 Q And you used that in answering interrogatories

24 contained in Exhibit 14; correct?

25 A Correct.

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1 Q Thank you.

2 (Exhibit 18 marked for identification.)

3

4 BY MR. OLSON:

5 Q This is Exhibit 18. It's marked D680. It's from

6 John Busby to you and cc'd to Phil Heston. Can you

7 describe the circumstances surrounding this

8 document and what it refers to?

9 A This is referring to a direct employee reporting to

10 Phil Heston. His name is Dick Kimmel. His wife was

11 having some serious health issues and Dick was having

12 significant distraction issues at work, and it was

13 asking us to have a conversation with him to get help

14 during the day so that he could be focused on his

15 job.

16 Q Okay. And is he still with the company?

17 A Yes, he is.

18 Q What's his job?

19 A It's the same role it was at the time of this, an

20 account representative.

21 Q Okay. And, I'm sorry, you said his last name is

22 what?

23 A Kimmel, K-I-M-M-E-L.

24 (Exhibit 19 marked for identification.)

25

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1 BY MR. OLSON:

2 Q This is Exhibit 19. It's a couple of e-mails

3 starting February 9, 2012 at 1:27 p.m. from Matt

4 Chavez to a series of individuals. You're not
5 listed on here but I'd like to ask you questions
6 about it when you're ready.

7 A Okay.

8 Q Did you talk to anyone about the topic of Ms. Wink
9 being in the office three days a week and being at
10 home two days a week around this time of
11 February 9, 2012?

12 A Tracy had requested to work from home two days a week
13 and we granted that request on a temporary basis, and
14 this e-mail is notifying groups that she worked with
15 that her schedule would be changing and changes in
16 work assignments.

17 Q Who gave the approval for this --

18 MS. LORENC: Objection, form.

19 BY MR. OLSON:

20 Q -- if you know?

21 A Myself, Matt Chavez, Margo Eshleman, and John Busby.

22 Q And at the time that this was granted, was there
23 any communication to Ms. Wink how long it would
24 last?

25 A There was never a commitment of how long it would

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1 last, but we were clear that it wasn't indefinite and
2 that it was temporary.

3 Q Who were you clear to on that point?

4 A Her --

5 Q In other words, did you tell Ms. Wink that?

6 A I did not have the direct conversation with her about

7 that. Her direct supervisor did. But I was very

8 clear with her direct manager and next-level manager

9 Margo and with John Busby the president of the

10 company.

11 Q Okay. And at the time you knew that she was caring

12 for her son two days per week; is that correct?

13 MS. LORENC: Objection, asked and

14 answered. You can answer it.

15 THE WITNESS: It was on or about that

16 time.

17 BY MR. OLSON:

18 Q Okay. And was there discussion with Ms. Wink that

19 if she needed to care for her son, she should apply

20 for FMLA?

21 A No, because she already had applied and was approved.

22 Q Previously. Was there any discussion in the

23 context of her working from home that she should

24 get recertified for FMLA?

25 A There were two different issues: Her working from

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1 home and her approved time off.

2 Q Okay. Do you see the three bullet points in

3 Exhibit 19?

4 A Yes.

5 Q As of July 13, 2012, did you anticipate that any of

6 the tasks in those bullet points would change?

7 A Everything changed as of July 2012.

8 Q I'm focused in particular on those three bullet

9 points. How would the first bullet point have

10 changed as of July 13, 2012?

11 A Her direct supervisor would have to answer how that

12 specifically would have changed, but the second

13 bullet point would have changed because Maivue was

14 laid off -- or, I'm sorry, Roseanne was laid off in

15 July of 2012.

16 Q So who took over that, distributing the morning

17 reports?

18 A I'm not sure who took over that.

19 Q Okay. How long did that take each day?

20 A I have no idea.

21 Q Okay. And is it Ms. or Mr. Thao?

22 A Ms.

23 Q Ms. Thao processing ferrous and nonferrous

24 invoices, did that change?

25 A I don't recall. Matt would know that.

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1 Q And that was something that Ms. Wink was not

2 trained in; is that right?

3 A I don't recall if she was trained on the ferrous
4 invoices. I know that she wasn't trained on the
5 nonferrous invoices.

6 (Exhibit 20 marked for identification.)

7 BY MR. OLSON:

8 Q This is Exhibit 20. It is a July 16, 2012, e-mail
9 from you to Alan Dahl at 4:26 p.m., cover copy to
10 Peggy Malmstadt, Sheri Kubiak, and Matt Chavez
11 regarding Tracy Wink. Did you author this e-mail?

12 A Yes, I did.

13 Q Is it accurate?

14 A Yes, it is.

15 Q And did you intend that this would go into
16 Ms. Wink's personnel file?

17 A Yes, I did.

18 Q And this is at 4:26 in the afternoon. As I recall
19 you had met with Ms. Wink that morning. What
20 happened with regard to Ms. Wink if anything
21 between the morning when she told you that she
22 could not accommodate the work schedule and this
23 time when you issued this e-mail?

24 MS. LORENC: Objection to form. If you
25 know.

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1 THE WITNESS: Nothing happened.

2 BY MR. OLSON:

3 Q Okay. And you state here the company was no longer
4 able to continue the scheduling flexibility she was
5 requesting. That scheduling flexibility was with
6 respect to her working at home two days per week?

7 A It was with respect to her working from home two days
8 per week, and it was with respect to the
9 seven-to-three versus eight-to-four scheduled hours.

10 Q Okay.

11 (Exhibit 21 marked for identification.)

12 BY MR. OLSON:

13 Q This is Exhibit 21. Do you recognize this
14 document?

15 A Yes, I do.

16 Q What is it?

17 A It's a time record for Tracy Wink for the pay period
18 of it looks like July 9th through July 15th, 2012.

19 Q All right. And this record, does it reflect when
20 an employee is on FMLA and when they are not?

21 A It would have, yes.

22 Q And where would -- So where would it show that?

23 A In the column next to the date on the pay code. If
24 it was FMLA time, it would have a code that says
25 FMLA -- or I think it says unpaid or non-paid time,

1 FMLA.

2 Q Is this part of the document from the system you

3 mentioned earlier?

4 A Yes.

5 Q What's the name of that again?

6 A Kronos.

7 Q Kronos. Who would have made those entries

8 designating certain time designated as FMLA time?

9 A She could have made an entry herself.

10 Q Who's she?

11 A Tracy could have made the entry herself. Matt Chavez

12 could have made the entry. Margo Eshleman could have

13 made the entry. Peggy Malmstadt or myself in HR

14 could have made the entry, or the payroll department

15 could have made the entry.

16 Q So when Wink was at home, if she worked some hours

17 on the days that she was there caring for her son,

18 she could go into the system from her house and put

19 the hours in?

20 A Yes.

21 Q And then I assume somebody in management would

22 check it before it was processed in finality?

23 A Her direct manager would approve the time card, then

24 the payroll processor would approve the time card.

25 Q Did you discuss with Ms. Wink applying for

1 unemployment compensation?

2 A Yes, I did.

3 Q Tell me everything you recall as completely and

4 concisely and accurately as you can what you

5 discussed with her about applying for unemployment

6 compensation.

7 A After she had informed the company that the change in

8 work schedule would not work for her and that she was

9 quitting -- I believe that was on a Monday, the

10 16th --

11 Q She didn't actually say she was quitting, did she?

12 A She said I can't do what you're asking.

13 Q Right. She didn't use the term I'm quitting, did

14 she?

15 A She just said where do we go from here --

16 Q Right.

17 A -- and then I --

18 Q Now, did you view that to be -- I'm sorry if I cut

19 you off. Did you have more to say?

20 A Go ahead.

21 Q Okay. At that point did you view that to be sort

22 of a standoff where you as the company were not

23 saying she was fired and she was saying I'm not

24 quitting?

25 A Yes, she asked me what that -- what it meant, where

1 we went from there.

2 Q Okay. And she said, well, are you telling me I'm

3 fired; something like that?

4 A She asked me if we said that she was fired, and I

5 told her, no, I'm not telling you you're fired.

6 Q Okay. And she conversely said I'm not quitting;

7 right?

8 A I don't remember if she said that or not.

9 Q Okay. So then go on. What was discussed about

10 unemployment compensation?

11 A So then after -- after we discussed that things

12 weren't going to work going forward, I had told her,

13 you know, I was really sorry to hear that she wasn't

14 going to remain with the company, that I would have

15 to have some discussions internally to see what we

16 could do for her in the transition.

17 I spoke with a number of people

18 internally including John Busby the president, and we

19 agreed that we would not contest her unemployment.

20 We felt that she had been a good, long-term employee

21 of the company, we wanted to do something to help her

22 out in the transition, and so I discussed with Tracy

23 the next day that the company wouldn't contest her

24 unemployment. I gave her a copy of how you apply for

25 unemployment benefits including the phone number and

1 the website address to apply for the benefits. I
2 instructed her how to complete the forms so that she
3 would be awarded benefits by the state, and I
4 informed her that the company would not provide any
5 information to the state regarding her separation.

6 Q Okay. Was that on July 17, 2012?

7 A It was between the 16th and the 17th, that Monday and
8 Tuesday, that those conversations happened.

9 (Exhibit 22 marked for identification.)

10 BY MR. OLSON:

11 Q This is Exhibit 22. It's Bate stamped Wink 27.
12 It's a discharge questionnaire. Is this the form
13 you just mentioned that you provided to Ms. Wink?

14 A No.

15 Q Okay. You gave her the application itself?

16 A No.

17 Q What form did you give her?

18 A I gave her the form from the DWD website that's
19 online that says how to apply for unemployment
20 benefits.

21 Q Okay. And Exhibit 22, you saw this in the process
22 of her applying for benefits?

23 A I don't recall how I got a copy of this. I normally
24 don't receive this from the state.

25 Q Please take a look at the verbiage inserted above

1 Ms. Wink's signature and date line. Does that
2 contain what you told her to fill in on the
3 document?

4 A I told her that she should inform the department that
5 the company was no longer able to offer her a
6 flexible schedule.

7 Q And do you view this to be consistent with that?

8 A I view it to be partially consistent with that.

9 Q Okay. How is it inconsistent?

10 A Because she lists it as the company could no longer
11 accommodate, and it wasn't an accommodation; it was
12 an exception from the normal schedule.

13 Q And that exception was pursuant to her FMLA
14 application; right?

15 A No, her exception was originally requested so that
16 she could drop her sons off and pick them up from
17 kindergarten.

18 Q Well, we can go back through the FMLA forms again,
19 but you knew she was caring for her son two days a
20 week, did you not?

21 MS. LORENC: Objection to form.

22 THE WITNESS: I knew that she was working
23 from home for two days a week, yes.

24 BY MR. OLSON:

25 Q You also knew she was caring for her son?

1 A I knew that she was caring for her son, yes.

2 Q Okay. At home two days per week; true?

3 MS. LORENC: Objection. This line has
4 been asked multiple times.

5 MR. OLSON: I'm asking again because I'm
6 getting conflicting information.

7 MS. LORENC: No, you're not. You can
8 answer again.

9 BY MR. OLSON:

10 Q We'll pull it out again and we'll take the time we
11 need. Did you or did you not know that she was
12 home two days per week caring for her son?

13 A I knew that she was telecommuting from home two days
14 per week, and I knew that she was caring for her son
15 on an intermittent basis.

16 Q And she had to be at home because the kid could not
17 be in day care, and she didn't have anyone to care
18 for him; is that true?

19 A That's what she put on her certification.

20 (Exhibit 23 marked for identification.)

21 BY MR. OLSON:

22 Q This is Exhibit 23. It's an Agreement With Respect
23 to Inventions, Confidentiality, Competition and
24 Term of Employment, Miller Compressing Company.
25 These are Bate stamped D90 through 95. Do you

1 recognize this document?

2 A Yes, I do.

3 Q Did you participate in drafting it?

4 A No, I did not.

5 Q When was the first time you saw it?

6 A When I was hired in 2003.

7 Q All right. And were you familiar with the
8 provision for three weeks of severance pay?

9 MS. LORENC: What page are you looking
10 at?

11 MR. OLSON: I asked her a question.

12 BY MR. OLSON:

13 Q Are you familiar with the provision that provides
14 for three weeks of severance pay? You're looking
15 for it so maybe you're not. I don't know; you tell
16 me.

17 A I'm familiar with the provision. I'm looking for the
18 specific section.

19 Q Okay. If I find it I'll let you know.

20 A It's section two on page two.

21 Q Okay. And had you ever paid out or instructed
22 payroll to pay out an employee the three weeks of
23 notice pay under rule of notice?

24 A Yes, I have.

25 Q And how many times did you do that?

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1 A Probably a hundred.

2 Q Okay. And did any employees have to sign a release
3 in order to get that pay?

4 A No.

5 Q Ms. Wink was the only individual who was requested
6 to sign a release in order to get that pay; is that
7 accurate?

8 A No, that's not accurate.

9 Q Did Ms. Wink ever receive the three weeks of notice
10 pay?

11 A No.

12 Q Who were the individuals who were asked to sign a
13 release in order to get three weeks of severance
14 pay?

15 A No one was asked to sign a release to get the
16 three -- Oh, to get three weeks of severance pay?

17 Q Right.

18 A You're referring to severance pay --

19 Q Pursuant to the provision contained in Exhibit 23.

20 A No one had to sign a release to get -- This is not
21 severance pay in this agreement.

22 Q Okay. What do you call it? Notice pay, in lieu of
23 notice?

24 A We called it pay in accordance with the non-compete

25 agreement.

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1 Q Okay. And in order to get that pay, did anyone
2 have to sign a release of legal claims?

3 A No.

4 Q And you said there were a hundred people who were
5 paid out on that?

6 A Correct.

7 Q And is that pay regarding noncompetition the same
8 pay that's reflected in Exhibit 24, Bate stamped
9 Wink 29?

10 A No, it is not.

11 Q How is it different?

12 A The non-compete agreement is specific to saying if an
13 employee is terminated without cause, that we would
14 agree to give three weeks advance pay in lieu of
15 advance notice.

16 Q Okay. Was she terminated without cause?

17 A She was not terminated.

18 Q She quit. Now, you understood though that she was
19 quitting under duress, didn't you?

20 MS. LORENC: Objection to form. You can
21 answer that.

22 BY MR. OLSON:

23 Q Do you understand she was quitting under duress?

24 A She was quitting because she couldn't meet the
25 scheduling requirements of the position.

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1 Q Right, but I mean was the sobbing and the running
2 out of the office any kind of an indication to you
3 that she was under duress, that she didn't have
4 somebody to watch her disabled child, and that she
5 couldn't make those arrangements in two days, over
6 a weekend especially, and when she told you that
7 she could not accommodate the work schedule
8 requirements of the company that you communicated
9 to her, that that was a -- that was a quitting
10 under duress?

11 MS. LORENC: Objection to form. You can
12 answer.

13 BY MR. OLSON:

14 Q Did any of those things indicate that to you?

15 A The company never informed her that her arrangements
16 had to be in place on that Monday. We asked for her
17 commitment by that Monday, that she would make that
18 commitment on an ongoing go-forward basis.

19 Q Okay. So how much time did you give her to make
20 the arrangements?

21 A We asked her to give us her commitment by that Monday
22 that she would be making those changes.

23 Q Okay. And you wanted her to give you some specific

24 indication as to how she was going to do that;
25 correct?

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1 A Quite honestly, the company didn't care how she was
2 going to do that. The company just wanted her
3 commitment that she would be working eight to four.

4 Q Right. And she told you she couldn't do it; right?

5 A Correct.

6 Q And she was crying about it the Friday before;
7 right?

8 A Correct.

9 Q And she came back and said I couldn't do it; I
10 can't make these arrangements; my mom can only do
11 it three days a week, and I've got to be there for
12 my son the other two days; correct?

13 A Correct.

14 Q Did you understand she was quitting under duress?

15 A I didn't believe that she was quitting under duress,
16 no.

17 Q No? So who did you believe that she could have had
18 caring for her disabled son on the days that she
19 should have been at work?

20 MS. LORENC: Objection to form.

21 THE WITNESS: That's not my business and
22 honestly, I don't care.

23 BY MR. OLSON:

24 Q Right. So did you understand that she was in a
25 difficult position as of Monday in that she had no

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1 alternatives to send her disabled son to day care
2 or to have a family member such as her mom cover
3 the other days? You knew that, did you not?

4 A I understood she couldn't do the schedule eight to
5 four.

6 Q Right. And you understood that she was under
7 duress at that point when she quit. She wanted to
8 work at the company. The only reason she couldn't
9 was because she couldn't meet the demands of
10 working five days a week in the office; true?

11 A At that point in time she couldn't.

12 Q Is that right?

13 A Which was -- it was okay for the company for her not
14 to work --

15 Q Do you agree with what --

16 MS. LORENC: Just answer his question.

17 BY MR. OLSON:

18 Q -- I said?

19 A You asked if the company felt that she couldn't work
20 in the office five days a week --

21 Q Right.

22 A -- and I said that was fine with the company.

23 Q So you told her on Monday, you know, look, if you
24 need more time that's fine, you take the time you
25 need, see if you can find somebody else to watch

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1 your disabled son two days per week, we'll give you
2 the time you need; is that what you're telling us?

3 A No, what -- what changed is that her telecommuting
4 was no longer going to work for the company. We
5 never told her that her FMLA absences would
6 discontinue to be approved. We told her that her
7 schedule would be Monday through Friday, eight to
8 four.

9 Q You never told her that if she needed to care for
10 her son two days per week as she had been doing and
11 as you had received notice, that she could continue
12 to do that; correct?

13 A We never told her she couldn't continue to do that.

14 Q Okay.

15 A We told her her schedule was Monday through Friday,
16 eight to four.

17 Q Why did you not tell her that if she needed to be
18 home caring for her son two days a week, she could
19 do that? If that was okay with you, why didn't you
20 just tell her that?

21 A Because what we weren't allowing was her to

22 telecommute two days per week.

23 Q Well, you knew she was home with her son two days a
24 week, and you also knew that you were saying she
25 had to be in the office five days per week. Those

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1 two things are mutually exclusive, would you agree?

2 She can't do both. Would you agree she -- Let's
3 take it from this: Do you or do you not agree that
4 Ms. Wink would not be able to be at home caring for
5 her disabled son two days per week while at the
6 same time she's in the office five days per week?

7 A Somebody's work schedule versus their approved FMLA
8 absences are two --

9 Q Hold on.

10 A -- different things.

11 Q Hold on. All you have to do is answer my question.

12 MS. LORENC: She is and you keep
13 interrupting her.

14 BY MR. OLSON:

15 Q Do you agree that it would have been physically
16 impossible for Ms. Wink to be at home caring for
17 her son two days per week while at the same time
18 she was in the office five days per week?

19 MS. LORENC: Can you let her finish her
20 answer?

21 MR. OLSON: Only if she answers my

22 question.

23 MS. LORENC: I think she's trying to and
24 you keep interrupting her.

25 MR. OLSON: She's not and you're

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1 interfering.

2 BY MR. OLSON:

3 Q It's a simple question. Do you agree it would be
4 physically impossible for her to work in the office
5 five days per week while at the same time she's at
6 home caring for her disabled son two days per week?

7 A I agree someone cannot be in two places at once.

8 Q Okay. Now we've established that basic rule of
9 physics. And when you told her that she needed to
10 be in the office five days per week, you never told
11 her that the exception was she could still care for
12 her son in her home two days per week like she had
13 been doing all along; correct?

14 A We never discussed that her --

15 Q Is that correct; yes or no?

16 MS. LORENC: Could you let her answer?

17 MR. OLSON: No. She can answer yes or
18 no. I'm not going to have her --

19 MS. LORENC: She doesn't have to answer
20 yes or no.

21 MR. OLSON: She does --
22 MS. LORENC: No, you cannot --
23 MR. OLSON: -- if it's a yes or no --
24 MS. LORENC: Show me a rule that says you
25 have to require her to answer yes or no.

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1 MR. OLSON: She's not entitled to waste
2 our time and you're not entitled to waste our money
3 anymore.
4 Please read back the question. I want
5 a yes or no answer.
6 MS. LORENC: And I'm instructing you you
7 don't have to give a yes or no answer if you can't.
8 You answer the question.
9 MR. OLSON: This game playing is over.
10 MS. LORENC: There's no game playing.
11 You keep interrupting her because you're not
12 getting the answer you want.
13 MR. OLSON: Right.
14 Please read back my question.
15 (Requested portion read by the reporter.)
16 BY MR. OLSON:
17 Q Is that correct or is it incorrect?
18 A We never addressed the FMLA --
19 Q No, no --
20 A -- absence.

21 Q -- no, no. Okay, we're going to start again and I
22 want a clear answer. This has got to be clear.
23 The Court wants a clear record. We're not going to
24 dance around anymore. I want you to --
25 MS. LORENC: Excuse me.

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1 MR. OLSON: -- answer this question.
2 MS. LORENC: You're harassing my client
3 and we're about to leave. You don't get to say
4 she's dancing --
5 MR. OLSON: You do so at your own risk.
6 MS. LORENC: You're harassing her. Let
7 her answer the question.
8 MR. OLSON: I'll get an answer to this
9 question if we have to stay here all day and next
10 week, I don't care, because the Court doesn't like
11 it when we have an unclear record.
12 MS. LORENC: The Court also doesn't like
13 it when you harass her. You're not letting her
14 answer the question.
15 MR. OLSON: She's going to answer this
16 question, and she's going to do it concisely and
17 it's a yes or no question.
18 BY MR. OLSON:
19 Q When you told Ms. Wink that she had to be in the

20 office working five days per week, you never told
21 her that the exception would be she could be at
22 home caring for her son two days per week; yes or
23 no?

24 A I --

25 MS. LORENC: If you can answer that yes

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1 or no do it, otherwise, you can say I've already
2 answered that.

3 THE WITNESS: I never --

4 MR. OLSON: No, no, I don't have an
5 answer.

6 THE WITNESS: -- told her she had to be
7 in the office five days a week.

8 BY MR. OLSON:

9 Q You didn't?

10 A I said --

11 Q Okay. Hold on.

12 A -- her schedule is Monday through Friday, eight to
13 four. That is what I told her.

14 Q Okay. Is Monday through Friday five days a week?

15 A That's five days a week.

16 Q All right. So when you told Ms. Wink that she had
17 to be in the office Monday through Friday, eight to
18 four, you never told her that the exception was
19 that she could be at home two days per week to care

20 for her son; yes or no?

21 A Yes, we never discussed that.

22 Q Thank you. See, it's very easy. Just focus on the

23 question and answer.

24 MS. LORENC: Okay. Then ask a question

25 and move on.

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1 MR. OLSON: I'd love to.

2 MS. LORENC: Are you okay? Do you need a

3 break?

4 THE WITNESS: I'm fine.

5 BY MR. OLSON:

6 Q Now, you had told Ms. Wink that the first time she

7 missed work, that would be -- that would constitute

8 a voluntary quit; correct?

9 MS. LORENC: Objection to form. You can

10 answer it.

11 THE WITNESS: I told her that if she

12 missed and it didn't fall under FMLA, it would be

13 counted against her attendance.

14 BY MR. OLSON:

15 Q Wait a minute. You told her that? You said

16 specifically if she missed and it didn't fall under

17 FMLA? Is that -- is that your testimony, that you

18 told her specifically FMLA? You used that

19 verbiage?

20 A You are asking about two different conversations
21 first of all.

22 Q Okay. I'm asking you whether you ever said words
23 to the effect that if she missed a day, that it
24 would be -- that it would constitute a voluntary
25 quit in the context of any communication after

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1 July 13, 2012.

2 A I don't recall telling her it would constitute a
3 voluntary quit. I recall telling her if she --
4 because she asked on the 16th what would happen if
5 she -- if she missed work, and I said it will count
6 under the attendance system if it's not excused and
7 protected under FMLA.

8 Q So you may have told her it would be a voluntary
9 quit; you don't know one way or the other?

10 A I don't -- I remember having the discussion with her
11 that -- on Monday when she said that this wasn't
12 something that she could do on an ongoing basis, that
13 the company considered that a voluntary quit.

14 Q All right. And I want this very clear in the
15 record. Your testimony today is that on the 16th
16 you told her that she could have FMLA time, and it
17 wouldn't be counted against her; is that your
18 testimony?

19 A Absolutely she could have FMLA time.
20 Q No, no, no. You told her that; that's your
21 testimony?
22 A Yes.
23 Q I want that in the record.
24 A Yes.
25 MS. LORENC: The whole thing's on the

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1 record.
2 BY MR. OLSON:
3 Q And you told her that on the 16th; right?
4 A Pardon?
5 Q You told her that on the 16th?
6 A Yes.
7 Q Did you tell her than on the 13th too?
8 A No, I did not -- I don't think I told her that on the
9 13th.
10 Q Tell us exactly what you said to her about FMLA
11 time on the 16th.
12 A She asked what would happen with her absences if she
13 didn't come into work on the schedule, and I said if
14 they're unexcused and they -- if they're not excused
15 and they don't fall under FMLA, it will count towards
16 the company's attendance system.
17 Q Do you know what the term key employee is under the

18 FMLA?

19 A Yes, I do.

20 Q And Ms. Wink was not a key employee, was she?

21 A No, she was not.

22 Q Would you agree that if an employee is ineligible
23 for FMLA leave, the notice must explain why the
24 employee is ineligible?

25 MS. LORENC: Objection to form. You can

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1 answer if you know the answer.

2 THE WITNESS: Yes, I believe.

3 BY MR. OLSON:

4 Q Okay. And do you also understand that the FMLA
5 requires that when an employer gives an employee
6 notice of ineligibility -- or strike that.

7 When the employer gives notice of
8 eligibility of FMLA, the employer has to provide
9 specific expectations to the employee in writing?

10 A Yes.

11 Q And the employer has to provide to the employee
12 specific obligations in writing?

13 A Could you read that back?

14 (Requested portion read by the reporter.)

15 THE WITNESS: Yes.

16 BY MR. OLSON:

17 Q And does the FMLA require that the employer

18 describe to the employee in writing the
19 consequences of failing to meet the expectations or
20 the obligations connected with the FMLA leave?

21 A Yes.

22 Q Are you aware that the FMLA requires that an
23 employer advise the employee in writing when
24 certain absences do not count as FMLA leave?

25 A Yes.

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1 Q Was any such notice ever given to Ms. Wink?

2 A Not that I'm aware of.

3 Q Are you aware that an employer cannot ask for a
4 second opinion on a certification for a 12-month
5 period?

6 MS. LORENC: Objection to form. You can
7 answer.

8 THE WITNESS: I don't know that specific.
9 I would have to look at that.

10 BY MR. OLSON:

11 Q Did you have an understanding as to what type of
12 care Ms. Wink would need to be providing for her
13 son to qualify for FMLA leave? In other words, on
14 the days that she was home caring for her son, did
15 you have an understanding sort of institutionally
16 on behalf of the company as to what kind of care

17 she'd have to provide to him in order to qualify
18 for FMLA leave for those times?
19 A My understanding was that she would be taking him for
20 assessments, doctor and therapy appointments, on
21 those days.
22 Q Is it your understanding that the FMLA allows a
23 family member to qualify for FMLA leave if she
24 attends to basic medical, hygienic, or nutritional
25 needs even if it's not part of ongoing treatment?

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1 MS. LORENC: Objection to form.
2 THE WITNESS: You're asking me some very
3 specific questions that I don't know off the top of
4 my head.
5 BY MR. OLSON:
6 Q Okay.
7 A Those are things that I would have to check with what
8 the statutes say.
9 Q Okay. So sitting here today you don't know if the
10 FMLA covers only things directly related to the
11 medical treatment such as driving the disabled
12 child to medical appointments, or whether it
13 extends beyond that; is that accurate?
14 A That's something I would have an attorney review,
15 correct.
16 Q Okay. Did you have that reviewed -- that issue

17 reviewed when you talked to Attorney Lynch?

18 A Yes, I did.

19 MS. LORENC: Objection, calls for
20 attorney-client privilege.

21 BY MR. OLSON:

22 Q So at the time of July 16, you were aware of what
23 the answer was to that question I just posed?

24 MS. LORENC: Objection --

25 BY MR. OLSON:

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1 Q In other words, you were aware of the scope of care
2 that would be covered for Ms. Wink under the FMLA?

3 MS. LORENC: Objection to the extent it
4 calls for privileged communications. If you can
5 answer that without divulging privileged
6 communications, go ahead.

7 THE WITNESS: Our attorney explained the
8 --

9 MS. LORENC: Okay. Be careful --

10 THE WITNESS: Yeah.

11 MS. LORENC: -- because you're getting
12 into attorney-client privilege here so --

13 THE WITNESS: So then, no, I can't answer
14 that.

15 MR. OLSON: All right. Subject to my

16 other objections about missing documents, that's
17 all I have for you at this time.

18 MS. LORENC: We'll read.

19 (The proceedings concluded at 2:29 p.m.)

20 (Original exhibits attached to original
21 transcript. Copies attached to copy transcripts.)
22
23
24
25

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1 STATE OF WISCONSIN)
) SS.
2 MILWAUKEE COUNTY)
3

4 I, Elaine A. Thies, RPR and Notary
5 Public in and for the State of Wisconsin, do hereby
6 certify that the preceding deposition was recorded by
7 me and reduced to writing under my personal
8 direction.

9 I further certify that said deposition
10 was taken at ALAN C. OLSON & ASSOCIATES, S.C., 2880
11 South Moorland Road, New Berlin, Wisconsin, on the
12 26th day of January, 2015, commencing at 9:03 a.m.
13 and concluding at 2:29 p.m.

14 I further certify that I am not a
15 relative or employee or attorney or counsel of any of

16 the parties, or a relative or employee of such
17 attorney or counsel, or financially interested
18 directly or indirectly in this action.

19 In witness whereof, I have hereunto
20 set my hand and affixed my seal of office on this 6th
21 day of February, 2015.

22

23 _____
24 ELAINE A. THIES - Notary Public
25 In and for the State of Wisconsin

My commission expires 11-4-17.

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1 STATE OF WISCONSIN)
2) SS.
3 MILWAUKEE COUNTY)

4

5 I, SARAH K. BARBIAN, do hereby certify
6 that I have read the foregoing transcript of
7 proceedings, taken on the 26th day of January, 2015,
8 at ALAN C. OLSON & ASSOCIATES, S.C., 2880 South
9 Moorland Road, New Berlin, Wisconsin, and the same is
10 true and correct except for the list of corrections,
11 if any, noted on the annexed errata sheet.

12

13 Dated at _____,

14 _____, this _____ day of

_____, 2015.

15

16

SARAH K. BARBIAN

17

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